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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 516

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

O. G. RICHTER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 17, 1940
CERTIORARI GRANTED NOVEMBER 18, 1940

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vs.

O. G. RICHTER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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1 BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 92208

O. G. RICHTER, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appearances: For Petitioner: Richard H. Wilmer, Esq., Douglas L. Hatch, Esq. For Respondent: Hugh Brewster, Esq.

Docket entries

1938

Feb. 5—Petition received and filed. Taxpayer notified. (Fee paid.)
Feb. 7—Copy of petition served on General Counsel.
Apr. 6—Answer filed by General Counsel.
Apr. 6—Request for Circuit hearing in Pittsburgh, Pa., filed by General Counsel.
Apr. 11—Notice issued placing proceeding on Pittsburgh Calendar. Answer and request served.
May 6—Motion for change in designation of place of hearing from Pittsburgh, Pa. to Washington, D. C. Calendar filed by taxpayer. 5/9/38 granted.
Oct. 14—Hearing set Dec. 6, 1938.
Dec. 6—Hearing had before Mr. Black. Stipulation of facts filed. Petitioner's brief due 1/5/39. Commissioner's brief due 2/4/39. Petitioner's reply due 2/20/38.
Dec. 16—Transcript of hearing 12/6/38 filed.

1939

Jan. 5—Brief filed by taxpayer. 1/6/39 copy served.
Jan. 30—Brief filed by General Counsel.
Feb. 18—Reply brief filed by taxpayer. 2/18/39 copy served.
June 12—Memorandum opinion rendered—C. R. Arundell, Division 7. Decision will be entered under Rule 50.
July 11—Computation of deficiency filed by Commissioner.
July 13—Hearing set Sept. 6, 1939, on settlement.
July 17—Consent to settlement filed by taxpayer.
July 24—Decision entered—C. R. Arundell, Division 7.
Oct. 13—Petition for review by U. S. Circuit Court of Appeals, Third Circuit, with assignments of error filed by General Counsel.
Oct. 23—Proofs of service filed by General Counsel (2).
Dec. 5—Motion for extension to 5/1/40 to prepare and transmit record filed by General Counsel.
Dec. 5—Order enlarging time to 5/1/40 to prepare and transmit record entered.

2 1940

Apr. 20—Statement of points filed by General Counse with proof of service thereon.

Apr. 20—Designation of portions of record, proceeding and evidence to be contained in the record filed by General Counsel, proof of service thereon.

Apr. 20—Objections to inclusion of "Statement of Points" in record on appeal filed by taxpayer; proof of service thereon.

Apr. 20—Designation of additional portions of the record to be included in record on appeal filed by taxpayer—proof of service thereon.

3 Before United States Board of Tax Appeals

[Title omitted.]
[File endorsement omitted.]

Petition

Filed Feb. 5, 1938

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:B:I:VMW–90D), dated November 9, 1937, and as a basis for his proceeding alleges as follows:

1. The petitioner is an individual with his residence located at 5454 Kipling Road, Pittsburgh, Pennsylvania.

2. The notice of deficiency (a copy of which is attached hereto and marked Exhibit A) was mailed to the petitioner on November 9, 1937.

3. The taxes in controversy are income taxes for the cal-
4 endar year 1934 in the amount of $3,232.13, being the amount of the deficiency asserted by the respondent.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) The Commissioner of Internal Revenue erred in including in the income of petitioner the net income arising under the trust established by the petitioner on December 29, 1930, as amended June 3, 1932, the beneficiary of which was his wife, Nannie C. Richter.

(b) The Commissioner of Internal Revenue erred in refusing to allow the petitioner a credit of $112.50 for foreign income taxes paid for the year 1934 on dividends of $2,250.00 from sources in Canada.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) On December 29, 1930, petitioner established a trust making The Union Trust Company of Pittsburgh, a corporation of the Commonwealth of Pennsylvania, trustee thereunder and naming his wife, Nannie C. Richter, the beneficiary of the net income arising under the trust, as amended on June 3, 1932, and entitled to distribution of such net income.

(b) Said trust continued unrevoked throughout the en-
5 tire taxable year 1934. The beneficiary, Nannie C. Richter, was alive during the entire year, received the entire net

income therefrom and paid in full her Federal income taxes on such net income. Consequently the net income arising from said trust was not income taxable to the petitioner.

(c) Attached hereto and marked Exhibit B is a copy of the instrument executed December 29, 1930, establishing the trust. Attached hereto and marked Exhibit C is a copy of the amendment to said trust executed June 3, 1932. By and under the terms and provisions of the trust income arising therefrom is not taxable as income to the petitioner, irrespective of the provisions providing for revocation of the trust or reversion of the corpus thereof or any other term or provision thereof.

(d) Income in the amount of $2,250.00 was received by petitioner during the year 1934 in the form of dividends from stocks in Canadian corporations, and upon such dividends there was paid by petitioner to the Dominion of Canada a total of $112.50 as income tax, and accordingly a credit of $112.50 was properly allowed to the petitioner for the year 1934 and was erroneously disallowed as a credit by the Commissioner of Internal Revenue.

6 Wherefore, the petitioner prays: That the Board may hear and determine his appeal; that the Board may find there is no deficiency in income tax of the petitioner for the year 1934; that the Board may find net income arising under the trust established December 29, 1930, as amended, was not income to petitioner; and that the Board find that income taxes paid on foreign income in the amount of $112.50 was properly allowable as a credit.

RICHARD H. WILMER,
DOUGLAS L. HATCH,
Attorneys for Petitioner,
Transportation Building,
Washington, D. C.

7 [*Duly sworn to by O. G. Richter; jurat omitted in printing.*]

8 *Exhibit A to petition*

TREASURY DEPARTMENT,
Washington, Nov. 9, 1937.

1091M. SN–N. Office of Commissioner of Internal Revenue. Address Reply to Commissioner of Internal Revenue and Refer to

Mr. O. G. RICHTER,
5454 Kipling Road, Pittsburgh, Pennsylvania.

SIR: You are advised that the determination of your income tax liability for the taxable year(s) ended December 31, 1934, discloses a deficiency of $3,232.13 as shown in the statement attached.

In accordance with section 272 (a) of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C1:P-7. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner,

By (Signed) CHAS. T. RUSSELL,
Deputy Commissioner.

Enclosures:
Statement.
Form 870.

9 STATEMENT

IT:B:1.
VMW-90D.

IN RE MR. O. G. RICHTER, 5454 KIPLING ROAD, PITTSBURGH, PENNSYLVANIA

Tax Liability for Taxable Year Ended December 31, 1934

Income tax, liability $41,988.87; assessed $38,756.74; deficiency $3,232.13.

Reference is made to the report of the internal revenue agent in charge at Pittsburgh, Pennsylvania, covering your income tax liability for the taxable year ended December 31, 1934.

In Bureau letter dated March 12, 1937, you were advised of adjustments in your net income, resulting in a deficiency of $3,232.13. Extensions to October 1, 1937, were granted within which you might file information in connection with the application of articles 131–3 of Regulations 86 relating to the Revenue Act of 1934. In regard to the request contained in your letter dated October 28, 1937, that a further extension to December 1, 1937, be granted for the filing of your protest, you are advised that in view of the long period of time allowed for the filing of your protest, it is impracticable for this office to grant your re-

quest. Therefore, this notice is issued as required by the Revenue laws.

In accordance with the decision entered by the United States Board of Tax Appeals on October 8, 1937, in connection with your case for the taxable year ended December 31, 1931 (Docket #81640), it is held that the sale of securities to your wife in 1931 was an actual sale for income tax purposes and, therefore, the income received in 1934 from these securities is not taxable in your separate return for 1934.

The adjustments in your tax liability disclosing a deficiency of $3,232.13 as shown in Bureau letter dated March 12, 1937, has been sustained.

Against the amount of total tax shown on your return, a credit of $112.50 was claimed for foreign income tax paid for the year 1934 on dividends of $2,250.00 from sources in Canada.

10 Article 131–3 of Regulations 86 relating to the Revenue Act of 1934 provides that if a taxpayer signifies in his individual return his desire to claim credit for income tax paid other than to the United States, the income tax return must be accompanied by form 1116 carefully filled in with all the information there called for and with the calculations of credits there indicated, and the form must be duly signed and sworn to or affirmed. If credit is sought for taxes already paid, the form must have attached to it the receipt for each such tax payment. If credit is sought for taxes accrued, the form must have attached to it the return on which each such accrued tax was based. This receipt or return so attached must be either the original, a duplicate original, a duly certified or authenticated copy or a sworn copy.

Inasmuch as the evidence required by the provisions of article 131–3 of Regulations 86 has not been furnished, the amount of $112.50 claimed against total tax as a credit for foreign income tax has been disallowed.

A recomputation of your net income and income tax liability follows:

Net income reported			$117,286.19
Add:			
Net income of the O. G. Richter Trust for Nannie C. Richter:			
Interest on tax-free covenant bonds	$3,545.00		
Dividends	2,452.50		
Other income	691.22		
Total		$6,688.72	
Less:			
Capital loss	$555.58		
Taxes paid	60.51		
Trustees commission	200.07	816.16	5,872.56
Net income adjusted			$123,158.75

11 Computation of Tax

Net Income as adjusted		$123,158.75
Less:		
Personal exemption	$ 2,500.00	
Credit for one dependent	400.00	2,900.00
Income subject to surtax		$120,258.75
Less:		
Dividends	$30,728.20	
Earned income credit	1,400.00	32,128.20
Balance subject to normal tax		$ 88,130.55
Normal tax at 4% on $88,130.55		3,525.22
Surtax on $120,258.75		38,534.55
Total tax		$ 42,059.77
Less: Tax paid at source		70.90
Income tax liability		$ 41,988.87
Income tax assessed, account #200810		38,756.74
Deficiency		$ 3,232.13

Explanation of Changes

In accordance with the recommendation of the revenue agent, your return has been adjusted to include the net income of the trust created by you in 1930 for the benefit of your wife, Nannie C. Richter.

12 The record indicates that under the provisions of section 166 of the Revenue Act of 1934 the trust created by you in 1930 for the benefit of your wife, Nannie C. Richter, was a revocable trust and, therefore, the net income is taxable to the grantor. In accordance with the provisions of the trust instrument, the trust could be terminated by you at any time with consent of the beneficiary and the title to the corpus would revest in the grantor upon the exercise of such power. The trust terminated on January 3, 1936, the corpus reverting to the grantor.

13 Before United States Board of Tax Appeals

[Title omitted.]
[File endorsement omitted.]

Answer

Filed April 6, 1938

Comes now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed in the above-entitled proceeding, admits and denies as follows:

1. Admits the allegations contained in Paragraph 1 of the petition.

2. Admits the allegations contained in Paragraph 2 of the petition.

3. Admits the allegations contained in Paragraph 3 of the petition.

4. Denies the allegations of error contained in subparagraphs (a) and (b) of Paragraph 4 of the petition.

5. Denies the allegations of fact contained in subparagraphs (a) to (d), inclusive, of Paragraph 5 of the petition.

Denies that petitioner is entitled to the relief prayed for in the final paragraph of the petition.

14 Denies generally and specifically each and every allegation contained in the petition not hereinbefore specifically admitted, qualified, or denied.

Wherefore, it is prayed that taxpayer's appeal be denied.

(Signed) J. P. WENCHEL,
G. W. K.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
LOREN P. OAKES,
Special Attorney,
Bureau of Internal Revenue.

15 Before United States Board of Tax Appeals

[Title omitted.]

[File endorsement omitted.]

Stipulation of facts

Filed Dec. 6, 1938

It is hereby stipulated and agreed by and between the parties hereto, the Petitioner acting by and through his attorneys, Richard H. Wilmer and Douglas L. Hatch, and the Respondent acting by J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, that the statements, dates, amounts, items, and exhibits hereinafter set forth and mentioned shall be admitted as true and correct, and that, subject to objection for incompetency, the same shall stand as evidence and facts herein without further proof, reserving however, to each party the right to introduce any other evidence not inconsistent therewith.

16 I

During the taxable year 1934 Petitioner was a resident of Pittsburgh, Pennsylvania, and filed his individual income tax return with the Collector of Internal Revenue at Pittsburgh,

Pennsylvania. His return was made on the cash basis. Petitioner's return showed a gross income of $127,949.40, a net income of $117,286.19 and total tax of $38,869.24, credit of $112.50 for income taxes paid to a foreign country, and a balance of tax of $38,756.74. Petitioner took credit on his return for a personal exemption of $2,500.00 and $400.00 for dependents. Petitioner's profession was that of accountant.

II

The taxes in controversy are income taxes for the calendar year 1934 in the amount of $3,232.13, being the amount of the deficiency asserted by the Respondent. The notice of deficiency was mailed to the Petitioner on November 9, 1937, and the petition herein was duly filed on February 5, 1938.

III

On December 29, 1930, the Petitioner, O. G. Richter, established
a trust making The Union Trust Company of Pittsburgh,
17 a corporation of the Commonwealth of Pennsylvania, trustee thereunder and naming his wife, Nannie C. Richter, the beneficiary of the net income arising under the trust—a copy of such trust instrument being attached hereto and marked Exhibit A.

IV

On June 3, 1932, an amendment to the trust instrument dated December 29, 1930, was executed by the petitioner and The Union Trust Company of Pittsburgh, as trustee—a copy of such amendment being attached hereto marked Exhibit B.

V

If called, the Petitioner would testify as follows:

"I at no time had any agreement or arrangement or understanding with my wife that at any time prior to the termination of the trust by its own time limits she would join with me upon my request for an earlier termination of the trust. She at no time entered into any agreement with me for the earlier termination of such trust and I at no time made any request upon her, and she never made any offer to join with me in so doing."

VI

The entire net income derived from said trust, as amended, from the date of its creation to the date of its termination, including the

year 1934, was paid by the trustee to Nannie C. Richter, the beneficiary thereof.

18

VII

The Petitioner's wife, Nannie C. Richter, died on November 26, 1935. The Federal income tax return of said Nannie C. Richter for the calendar year 1934 included therein the income derived from such trust as gross income.

VIII

Said trust, as amended, remained unrevoked and unmodified during the year 1934.

IX

The bonds, with unpaid coupons attached, which formed a part of the corpus of the trust were delivered to and held by the trustee until the termination of the trust and the stocks which formed a part of the corpus of the trust were delivered to the trustee and were transferred to the trustee and held by the trustee in its own name as such trustee until the termination of the trust, which termination took place upon the death of the wife of the Petitioner, Nannie C. Richter, on November 26, 1935.

X

The Petitioner is entitled to a credit of $112.50 because of foreign taxes paid by him on dividends of $2.250.00 from sources in the Dominion of Canada.

19

XI

In case the Board finds the income from the trust is not taxable to Petitioner, then it is agreed that Petitioner is not entitled to a credit of $70.90 as shown in the deficiency notice, for tax paid at the source by the trustee under the trust.

RICHARD H. WILMER,
Richard H. Wilmer,
DOUGLAS L. HATCH,
Douglas L. Hatch,
Attorneys for Petitioner.
J. P. WENCHEL,
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

20 *Exhibit A to stipulation*

KNOW ALL MEN BY THESE PRESENTS

That I, O. G. Richter, of the City of Pittsburgh, County of Allegheny and State of Pennsylvania (hereinafter called the Donor) for and in consideration of the sum of One (1.00) Dollar to me in hand paid by The Union Trust Company of Pittsburgh, a corporation of the Commonwealth of Pennsylvania, having its principal place of business in the City of Pittsburgh, county and state aforesaid, at and before the ensealing and delivery hereof, receipt of which is hereby acknowledged, have granted, bargained, sold, transferred, and set over, and by these presents do grant, bargain, sell, transfer, and set over, unto the said The Union Trust Company of Pittsburgh, and its successors, the securities listed in Schedule A hereto attached and made a part hereof, in trust, nevertheless, for the following uses and purposes, and none other:

To have and to hold the said securities and investments into which the same may hereafter be converted and make sale thereof when deemed advisable, and invest and reinvest the proceeds of such sales from time to time in such investments as it may deem safe and profitable without being limited to those investments designated by the laws of the Commonwealth of Pennsylvania as legal investments for trust funds; and to collect, re-

21 cover, and receive the interest, income, dividends, and profits upon the same for and during the term of this agreement as hereinafter set forth; and, after paying thereout the necessary expenses of management of the trust fund including the Trustee's compensation, to pay over the balance of said interest, income and profits to Nannie C. Richter, wife of the Donor herein, in such installments as she may request.

For the purpose of determining the income distributable to the beneficiary under the terms of this agreement, all profits on sales of securities, all dividends other than stock dividends, including liquidating dividends whether paid in cash or property to the extent that the same would be taxable for income tax purposes under the present or any future income tax law of the United States, and all other gains or profits which would under the present or any future income tax law be subject to tax, shall be considered as income distributable to the beneficiary under the terms of this agreement.

This agreement and the moneys, securities, and properties which are now or hereafter may be subjected hereto, are made subject to the following further conditions, to wit:

The Donor reserves the right to terminate this trust at any time during the continuance hereof with the consent of the beneficiary, and not otherwise, by giving thirty days notice in

writing of his intention so to do, accompanied by the written consent of the beneficiary, served upon the Donor, which thirty day period of notice may be waived by the Trustee, and, upon the exercise of this power of revocation, this trust shall and the moneys, securities, and properties then held under the terms hereof, shall be transferred, assigned and delivered to the Donor, or his nominee or nominees, and the receipt of the said Donor, or his nominee or nominees, shall be full and sufficient discharge of the Trustee with respect thereto.

In the event that this trust is not sooner terminated as above provided, it shall end on January 3, 1936, and the original corpus and additions, if any made thereto subsequently by the Donor, shall be paid, assigned, transferred, and delivered to the Donor as hereinbefore provided; and, in the event of the death of the Donor or the cestui que trust during the continuance of this trust, such decease shall operate as a revocation and the original corpus and any additions, if any made thereto subsequently by the Donor, shall be transferred, assigned, and paid over to the Donor or his legal representatives, discharged of the trust herein.

The Donor reserves the further right to subject additional moneys, securities, or other properties to the terms hereof by depositing the same with the Trustee which shall be held, managed, and disposed of in all respects as though transferred at the time of the execution hereof.

The Trustee shall not be liable for loss by depreciation of any of the securities transferred at the execution hereof, or hereafter added to this trust by the Donor, nor upon those investments made by the Trustee in accordance with the provisions of this agreement.

SCHEDULE A

The compensation of the Trustee shall be three (3%) per centum on the gross income and shall be payable at the time or times the income is disbursed in accordance with the terms hereof.

In witness whereof, the Donor has hereunto set his hand and seal and the Trustee has caused its corporate seal to be hereunto affixed, duly attested, at Pittsburgh, Pennsylvania, this 29th day of December A. D. 1930.

[SEAL] (Signed) O. G. RICHTER

THE UNION TRUST COMPANY OF PITTSBURGH,

By (Signed) D. V. PARKINSON, *Vice President.*

Witness:

(Signed) G. A. WILLIAMS.

Attest: (Signed) F. J. HILL,
Ass't Secretary.

(Initialed.)
C. E. Y.

6–$1,000—The American Rolling Mill Company, 5% Sinking Fund Gold Debentures, due January 1, 1948. Coupons due July 1, 1931 and all subsequent attached. Nos. 112 to 117 inclusive.

5–$1,000—General Motors Acceptance Corporation, Ten-Year Sinking Fund 6% Coupon Gold Debentures, due February 1, 1937. Coupons due February 1, 1931 and all subsequent attached. Nos. 21936 to 21940 inclusive.

5–$1,000—Pittsburgh Railways Company, 6% Car Trust Gold Bonds, due February 1, 1932. Coupons due February 1, 1931 and all subsequent attached. Nos. M1450 to M1454 inclusive.

5–$1,000—Standard Power and Light Corporation, 6% Gold Debentures, due February 1, 1957. Coupons due February 1, 1931 and all subsequent attached. Nos. M140 to M144 inclusive.

5–$1,000—Aluminum Company of America, 5% Sinking Fund Debenture Gold Bonds, due March 1, 1952. Coupons due March 1, 1931 and all subsequent attached. Nos. 56393 to 56397 inclusive.

4–$1,000—Commonwealth Subsidiary Corporation, 5½% Gold Debentures, Series A, due September 1, 1948. Coupons due March 1, 1931 and all subsequent attached Nos. M17498 to M17501 inc.

5–$1,000—Siemens & Halske Stock Corporation and Siemens-Schuckertwerke Company, Limited, Twenty-Five Year 6½% Sinking Fund Gold Debentures, due September 1, 1951. Coupons due March 1, 1931 and all subsequent attached. Contingent Additional Interest coupons due May 1, 1931 to May 1, 1936 attached. Nos. M9312 to M9316 inclusive.

5–$1,000—The Bell Telephone Company of Pennsylvania, First and Refunding Mortgage 5% Gold Bond, Series C, due October 1, 1960. Coupons due April 1, 1931 and all subsequent attached. Nos. M46968 to M46972 inc.

10–$1,000—Detroit City Gas Company, First Mortgage 5% Gold Bonds, Series B, due October 1, 1950. Coupons due April 1, 1931 and all subsequent attached. Nos. M17389 to M17398 inc.

5–$1,000—West Penn Power Company, First Mortgage 5½% Gold Bonds, Series F, due October 1, 1953. Coupons due April 1, 1931 and all subsequent attached. Nos. 6888 to 6892 inclusive.

5–$1,000—American Gas and Electric Company, 5% Gold Debentures, due May 1, 2028. Coupons due May 1, 1931 and all subsequent attached. Nos. M16672 to M16676 inclusive.

10–$1,000—Duke-Price Power Company, Limited, First Mortgage Six Per Cent Sinking Fund Gold Bonds, Series A, due May 1, 1966. Coupons due May 1, 1931 and all subsequent attached. Nos. 665 to 674 inclusive.

5–$1,000—American Water Works and Electric Company, Incorporated, 6% Gold Debenture, Series A, due November 1, 1975. Coupons due May 1, 1931 and all subsequent attached. Nos. M7554 to M7558 inclusive.

26 5–$1,000—Lone Star Gas Corporation, Fifteen-Year 5% Sinking Fund Debenture Gold Bonds. Due May 1, 1942. Coupons due May 1, 1931, and all subsequent attached. Nos. 9952 to 9956 inclusive.

5–$1,000—The Pennsylvania Railroad Company, Forty-Year 5% Secured Gold Bonds. Due November 1, 1964. Coupons due May 1, 1931, and all subsequent attached. Nos. 21629 to 21633 inclusive.

10–$1,000—Frick-Reid Supply Corporation, Fifteen-Year 6% Sinking Fund Gold Debentures. Due June 1, 1943. Coupons due June 1, 1931, and all subsequent attached. Nos. M2499 to M2508 inclusive.

5–$1,000—Gulf Oil Corporation of Pennsylvania, Fifteen-Year 5% Debenture Gold Bonds, due December 1, 1937. Coupons due June 1, 1931, and all subsequent attached. Nos. 19828 to 19832 inclusive.

15–$1,000—Philadelphia Company, 5% Secured Gold Bonds, Series A. Due December 1, 1967. Coupons due June 1, 1931, and all subsequent attached. Nos. M27488 to M27497 inclusive, M41302 to M41306 inclusive.

5–$1,000—West Penn Power Company, First Mortgage 5% Gold Bonds, Series G, due June 1, 1956. Coupons due June 1, 1931, and all subsequent attached. Nos. 228 to 232 inclusive.

27 10 shares—Aluminum Company of America, 6% Cumulative Preferred Stock.

25 shares—Jones & Laughlin Steel Corporation, Cumulative 7% Preferred Stock.

100 shares—Koppers Gas and Coke Company, 6% Cumulative Preferred Stock.
100 shares—Lone Star Gas Corporation, Cumulative 6½% Preferred Stock.
100 shares—Oil Well Supply Company, Convertible 7% Cumulative Preferred Stock.
110 Shares—Public Service Corporation of New Jersey, Common Stock.
50 shares—The West Penn Electric Company, 6% Cumulative Preferred Stock.
50 shares—West Penn Power Company, 7% Cumulative Preferred Capital Stock.

28 *Exhibit B to stipulation*

Whereas, O. G. Richter has heretofore, to wit under date of December 29, 1930, executed a certain trust agreement wherein The Union Trust Company of Pittsburgh is Trustee, and Nannie C. Richter, wife of the said O. G. Richter, is beneficiary; and

Whereas, said trust agreement provides, inter alia, as follows: "In the event that this trust is not sooner terminated * * * it shall end on January 3, 1936, and the original corpus and additions, if any made thereto subsequently by the Donor, shall be paid, assigned, transferred and delivered to the Donor * * *", and

Whereas, it is the desire of the Donor to amend the said trust agreement so that the same shall be extended for the further period of two years from the said date of January 3, 1936.

Now, therefore, it is mutually agreed between the parties hereto that the said agreement of December 29, 1930, be and the same hereby is amended with respect to that part thereof as above quoted so that the same shall read as follows:

"In the event that this trust is not sooner terminated as above provided it shall end on January 3, 1938, and the original corpus and additions, if any made thereto subsequently by the Donor, shall be paid, assigned, transferred and delivered to the Donor * * *".

29 In witness whereof, O. G. Richter has hereunto set his hand and seal and The Union Trust Company of Pittsburgh has caused these presents to be executed by its Vice Presi-

dent and its common corporate seal to be hereunto affixed, duly attested, this 3rd day of June A. D. 1932.

[SEAL] (Sgd.) O. G. RICHTER,
THE UNION TRUST COMPANY OF PITTSBURGH,
[CORPORATE SEAL]
By (Sgd.) D. V. PARKINSON,
Vice President.

Witness:
(Sgd.) CHARLES E. YOUNG.
Attest:
(Sgd.) W. H. WILLS,
Assistant Secretary.

[Initialed]
CEY.

30 Before United States Board of Tax Appeals

Docket No. 92208

O. G. RICHTER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Douglas L. Hatch, Esq., for the petitioner.
Hugh Brewster, Esq., for the respondent.

Memorandum opinion

ARUNDELL: The respondent added to petitioner's income for 1934 the amount of income received by a trust created by petitioner, and disallowed a credit for foreign taxes. These adjustments resulted in a deficiency in income tax in the amount of $3,232.13. The parties have stipulated that the petitioner is entitled to a credit of $112.50 because of foreign taxes paid by him on dividends of $2,250 from sources in the Dominion of Canada. The issue left for decision is whether the trust income is taxable to the petitioner under Section 166 of the Revenue Act of 1934. We adopt by reference the stipulated facts as our findings of fact, and give here only a summary of them.

The petitioner in 1934 was a resident of Pittsburgh, Pennsylvania, and filed his income tax return with the collector there. By a trust instrument dated December 29, 1930, the petitioner placed a group of securities in trust with the Union Trust Company of Pittsburgh to pay the net income therefrom to the petitioner's wife

for the duration of the trust. Provision for termination was as follows:

"The Donor reserves the right to terminate this trust at any time during the continuance hereof with the consent of the beneficiary, and not otherwise, by giving thirty days notice in writing of his intention so to do, accompanied by the written consent of the beneficiary, * * *".

Unless the trust were terminated under the above provision it was to continue until January 3, 1936, (later extended to January 3, 1938) or until the death of either the petitioner or his wife prior thereto. On termination the corpus was to revert to the petitioner or his legal representatives. The petitioner did not at any time have any agreement with his wife that she would join with him upon his request for a termination of the trust prior to the time limited for its termination. The petitioner at no time asked his wife to join in an agreement for termination and she at no time offered to join with him in any agreement therefor. The petitioner's wife died on November 26, 1935.

The trust was in full force and effect throughout the year 1934, and the entire net income of the trust for that year was paid by the trustee to the petitioner's wife.

The respondent, in adding the trust income to petitioner's income for 1934, has proceeded on the theory that section 166 of the Revenue Act of 1934 makes the trust income taxable to the grantor of the trust. We have held otherwise in cases squarely in point on the facts. Meredith Wood, 37 B. T. A. 1065; affirmed per curiam May 29, 1939; John Edward Rovensky, 37 B. T. A. 702; Daniel P.
31 Woolley, 39 B. T. A. —. In accordance with our holdings in the cited cases we hold here that the trust income was not taxable to the petitioner for the year 1934.

A stipulated adjustment as to a credit for tax paid at the source by the trustee will be made in the recomputation.

Decision will be entered under Rule 50.

Entered June 12, 1939.

32 Before United States Board of Tax Appeals, Washington

Docket No. 92208

O. G. RICHTER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Decision

Pursuant to the Memorandum Opinion of the Board entered June 12, 1939, the respondent herein having on July 11, 1939, filed

a recomputation and the petitioner having on July 17, 1939, filed an acquiescence therein, now therefore, it is

Ordered and decided: That there is no deficiency in income tax for the taxable year 1934.

Enter:

Entered July 24, 1939.

(Signed) C. R. ARUNDELL, *Member.*

33 In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

[File endorsement omitted.]

Petition for review and assignments of error

Filed Oct. 13, 1939

To the Honorable Judges of the United States Circuit Court of Appeals for the Third Circuit:

Now comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Samuel O. Clark, Jr., Assistant Attorney General, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and John W. Smith, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I

JURISDICTION

That the petitioner on review is the duly appointed, qualified and acting Commissioner of Internal Revenue, hereinafter referred to as the Commissioner, appointed and holding his office by authority of the laws of the United States; that the respondent on review, O. G. Richter, hereinafter referred to as the taxpayer, is an individual residing at 5454 Kipling Road,
34 Pittsburgh, Pennsylvania, and filed his Federal income tax return (Form 1040), for the calendar year 1934 with the Collector of Internal Revenue for the Twenty-third District of Pennsylvania, Pittsburgh, Pennsylvania, whose office is within the jurisdiction of this Honorable Court; that the Court in which the review of this cause is sought is the United States Circuit Court of Appeals for the Third Circuit.

The Commissioner files this petition for review pursuant to the provisions of Sections 1001–1003 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 109–110, as amended by Section 603 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 873, Section 1101 of the Revenue Act of 1932, c. 209, 47 Stat. 169, 286, and Section 519 of the Revenue Act of 1934, c. 277, 48 Stat. 680, 760.

II

NATURE OF CONTROVERSY

The nature of the controversy is as follows, to wit:

On December 29, 1930, the taxpayer executed a deed of trust whereby he transferred certain securities to the Union Trust Company of Pittsburgh, Pennsylvania, as trustee, the net income therefrom to be paid to taxpayer's wife, Nannie C. Richter, for the duration of the trust. The trust was to continue until January 3, 1936. By a separate agreement dated June 3, 1932, the term was extended to January 3, 1938, or until the death of either the taxpayer or his wife prior thereto. Upon termination, the
35 corpus of the estate was to revert to the taxpayer or his legal representatives. Under the terms of the trust instrument the taxpayer reserved the right to terminate the trust at any time during the continuance of the trust with the consent of the beneficiary by giving thirty days' notice in writing to the trustee, of his intention to do so, accompanied by the written consent of the beneficiary.

On November 9, 1937, the Commissioner mailed to the aforesaid taxpayer a notice of deficiency in Federal income taxes for the calendar year 1934 in the amount of $3,232.13. In arriving at said deficiency, the Commissioner determined that the net income in the amount of $5,872.56 for the calendar year 1934, arising from the trust, was taxable to the taxpayer for the year when earned inasmuch as he, as the grantor of the trust, remained, in substance, the owner of the property producing the income within the meaning of the provisions of Section 166 of the Revenue Act of 1934, 48 Stat. 680 (U. S. C. Title 26, Section 166) and Article 166–1 of Regulations 86, as amended by Treasury Decision 4629, C. B. XV–1, page 140 (1936) relating to revocable trusts.

On February 5, 1938, the taxpayer filed a petition with the United States Board of Tax Appeals from the deficiency as set forth in the notice of deficiency aforesaid, alleging that the Commissioner's determination was incorrect for the reason that the trust continued unrevoked throughout the calendar year 1934,
and, under the terms of the trust instrument, the income
36 arising therefrom was not taxable to the taxpayer, irrespective of the provisions of said instrument and its amendment, providing for revocation or reversion of the corpus of the trust estate to the taxpayer or his legal representatives. The Commissioner filed his answer to the petition on April 6, 1938. The proceedings came on for hearing before a division of the Board on December 6, 1938. On June 12, 1939, the Board entered its memorandum opinion wherein it held that the trust income was

not taxable to the taxpayer within the meaning of Section 166 of the Revenue Act of 1934, supra.

On July 24, 1939, the Board entered its final order of redetermination wherein and whereby it ordered and decided that there is no deficiency in Federal income tax for the calendar year 1934.

III

ASSIGNMENTS OF ERROR

The Commissioner being aggrieved by the conclusions of law contained in the decision of the United States Board of Tax Appeals and by its final order redetermining no deficiency in Federal income tax for the calendar year 1934 desires to obtain a review by the United States Circuit Court of Appeals for the Third Circuit.

The Commissioner's assignments of error are as follows:

1. The Board erred in holding and deciding that the income arising from the trust created by the taxpayer for the benefit of his wife, Nannie C. Richter, was not taxable to him under the provisions of Section 166 of the Revenue Act of 1934, 48 Stat. 680 (U. S. C. Title 26, Section 166) and Article 166-1 of Regulations 86, as amended by Treasury Decision 4629, C. B. XV-1, page 140 (1936).

37 2. The Board erred in holding and deciding that the income derived from the trust during the calendar year 1934 was not taxable to the settlor, O. G. Richter.

3. The Board erred in holding and deciding that the terms and provisions of the trust instrument executed by the respondent on review, O. G. Richter, did not constitute a power to revest the corpus of the trust estate in the trustor within the meaning and intendment of Section 166 of the Revenue Act of 1934, 48 Stat. 680 (U. S. C. Title 26, Section 166) and Article 166-1 of Regulations 86, as amended by Treasury Decision 4629, C. B. XV-1, page 140 (1936).

4. The Board erred in entering its final order of redetermination that there is no deficiency in income tax for the calendar year 1934.

5. The Board erred in failing and refusing to enter a final order of redetermination that there is due from the taxpayer a deficiency of $3,232.13 for the calendar year 1934.

6. The Board erred in that its decision is not supported by and is contrary to the evidence.

Wherefore the Commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Third Circuit, that a transcript of record be prepared in accordance with the rules of said Court

and transmitted to the Clerk of said Court for filing, and that proper action be taken to the end that the errors complained of may be reviewed by said Court.

(Sgd.) SAMUEL O. CLARK, Jr.,
Assistant Attorney General,

(Signed) J. P. WENCHEL,
R. L. W.
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
JOHN W. SMITH,
Special Attorney,
Bureau of Internal Revenue.

JWS:cm. 10–12–39.

[*Duly sworn to by John W. Smith; jurat omitted in printing.*]

In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]
[File endorsement omitted.]

Notice of filing petition for review

Filed Oct. 23, 1939

To O. G. RICHTER,
5454 *Kipling Road, Pittsburgh, Pa.*

You are hereby notified that the Commissioner of Internal Revenue did, on the 13th day of October, 1939, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Third Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 13th day of October, 1939.

(Signed) J. P. WENCHEL,
R. L. W.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 20th day of October 1939.

(Signed) O. G. RICHTER,
Respondent on Review.

41 In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]
[File endorsement omitted.]

Notice of filing petition for review

Filed Oct. 23, 1939

To DOUGLAS L. HATCH, Esq., and RICHARD H. WILMER, Esq.
616 Transportation Building, Washington D. C.

You are hereby notified that the Commissioner of Internal Revenue did, on the 13th day of October 1939, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Third Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 13th day of October 1939.

(Signed) J. P. WENCHEL,
R. L. W.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 16th day of October 1939.

(Signed) DOUGLAS L. HATCH,
(Signed) RICHARD H. WILMER,
Counsel for Respondent on Review.

42 In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]
[File endorsement omitted.]

Statement of points to be relied upon by petitioner on review by the United States Circuit Court of Appeals for the Third Circuit of the decision of the United States Board of Tax Appeals entered July 24, 1939.

Filed April 20, 1940

Now comes Guy T. Helvering, Commissioner of Internal Revenue, the petitioner on review herein, by and through his attorneys, Samuel O. Clark, Jr., Assistant Attorney General, and J. P.

Wenchel, Chief Counsel, Bureau of Internal Revenue, and hereby asserts the following errors which he intends to rely on in this review:

1. The Board erred in holding and deciding that the income arising from the trust created by the taxpayer for the benefit of his wife, Nannie C. Richter, was not taxable to him under the provisions of Section 166 of the Revenue Act of 1934, 48 Stat. 680 (U. S. C. Title 26, Section 166) and Article 166-1 of Regulations 86, as amended by Treasury Decision 4629, C. B. XV-1, page 140 (1936).

2. The Board erred in holding and deciding that the income derived from the trust during the calendar year 1934 was not taxable to the settlor, O. G. Richter.

43 3. The Board erred in holding and deciding that the terms and provisions of the trust instrument executed by the respondent on review, O. G. Richter, did not constitute a power to revest the corpus of the trust estate in the trustor within the meaning and intendment of Section 166 of the Revenue Act of 1934, 48 Stat. 680 (U. S. C. Title 26, Section 166) and Article 166-1 of Regulations 86, as amended by Treasury Decision 4629, C. B. XV-1, page 140 (1936).

4. The Board erred in failing to hold and decide that the income arising from the trust herein involved was taxable to the settlor under the provisions of Section 22 (a) of the Revenue Act of 1934.

5. The Board erred in failing to hold and find that for the purpose of Section 22 (a) of the Revenue Act of 1934, the settlor continued to be the owner of the corpus of the trust instrument herein.

6. The Board erred in entering its final order of redetermination that there is no deficiency in income tax for the calendar year 1934.

7. The Board erred in failing and refusing to enter a final order of redetermination that there is due from the taxpayer a deficiency of $3,232.13 for the calendar year 1934.

8. The Board erred in that its decision is not supported by the evidence.

44 9. The Board erred in that its decision is contrary to law and regulations.

(Sgd.) SAMUEL O. CLARK, Jr.,
Assistant Attorney General,
(Signed) J. P. Wenchel,
(Sgd.) J. P. WENCHEL,
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

Service of a copy of the within statement of points is hereby admitted this 19th day of April 1940.

DOUGLAS L. HATCH,
Counsel for Respondent on Review.

JWS:cm. 4-15-40.

45 In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

[File endorsement omitted.]

Designation of portions of record, proceedings and evidence to be contained in the record on review

Filed April 20, 1940

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Third Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Third Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of all proceedings before the Board.

2. Pleadings before the Board:

(a) Petition including copy of deficiency letter—Exhibit A. (Exhibits B and C are duplicates of Exhibits A and B attached to stipulation of facts—Item 3).

(b) Answer.

3. Stipulation of facts with Exhibits A and B attached.

4. Opinion entered June 12, 1939.

5. Decision entered by the Board on July 24, 1939.

46 6. Petition for review together with proof of service of notice of filing petition for review and of service of petition for review.

7. Order enlarging time for the preparation of the evidence and for the transmission of the record.

8. Statement of Points to be relied upon.

9. This designation of portions of record, proceedings and evidence to be contained in the record on review.

Said transcript is to be prepared, certified, and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Third Circuit.

(Signed) J. P. WENCHEL,
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

Service of a copy of the within designation of portions of record, proceedings and evidence to be contained in the record on review is hereby admitted this 19th day of April, 1940.

DOUGLAS L. HATCH,
Counsel for Respondent on Review.

JWS:cm. 4-15-40.

47 *In United States Circuit Court of Appeals for the Third Circuit*

[File endorsement omitted.]
[Title omitted.]

Objection to inclusion of "Statement of Points" in Record on appeal

Filed April 20, 1940

Now comes the Respondent on Review, O. G. Richter, by and through his attorneys, and respectfully objects to the inclusion in the Record on Appeal in this case of the Statement of Points, included in the "Designation of Portions of Record, Proceedings and Evidence to be Contained in the Record on Review," filed by the Petitioner on Review as Item 8 thereof. In support of such objection, the Respondent on Review respectfully submits that the Petitioner on Review heretofore filed its Petition for Review and Assignments of Error on or about October 13, 1939, and there was therein contained in said Petition on Review Assignments of Error. The Statement of Points sought to be included in
48 the Record undertakes to assign and raise additional and further grounds for the review of the decision herein of the United States Board of Tax Appeals to those contained in the aforesaid Assignments of Error and presents additional and further legal propositions not presented to the United States Board of Tax Appeals. The Petitioner further objects on the grounds that the rules of the United States Circuit Court of Appeals for the Third Circuit do not require "a concise statement of the points on which he [the Petitioner] intends to rely on the appeal" since the Petitioner on Review has designated for inclusion the complete record and all the proceedings and evidence in the action other than unnecessary and inconsequential matters which are not material to the appeal and which the rules contemplate should not be included.

Respondent on Review respectfully reserves his right to move to have said Statement of Points stricken from the Record.

RICHARD H. WILMER,
DOUGLAS L. HATCH,
Attorneys for Respondent on Review.

Service of a copy of the within Objection to Inclusion of "Statement of Points" in Record on Appeal is hereby admitted this 20th day of April A. D. 1940.

J. P. WENCHEL,
Counsel for Petitioner on Review.

49 *In United States Circuit Court of Appeals for the Third Circuit*

[Title omitted.]
[File endorsement omitted.]

Designation of additional portions of the record to be included in record on appeal

Filed April 20, 1940

To the Clerk of the United States Board of Tax Appeals:

You will please include in the Portions of the Record, Proceedings and Evidence to be contained in the Record on Appeal, in addition to that material designated by the Petitioner on Review, the following documents:

1. Objection to Inclusion of "Statement of Points" in Record.
2. Petition for Review and Assignments of Error.

RICHARD H. WILMER,
DOUGLAS L. HATCH,
Attorneys for Respondent on Review.

Service of a copy of the within Designation of Additional Portions of the Record to be Included in the Record on Appeal is hereby admitted this 20th day of April 1940.

J. P. WENCHEL,
Counsel for Petitioner on Review.

50 [Clerk's certificate to foregoing transcript omitted in printing.]

51 In United States Circuit Court of Appeals for the Third Circuit

No. 7418

GUY T. HELVERING, PETITIONER

v.

O. G. RICHTER, RESPONDENT

Motions to strike the statement of points and to dismiss the appeal

(Filed June 13, 1940)

Comes now the respondent in the above-entitled cause, by and through his counsel, and moves the Honorable Court that (1) the Statement of Points, filed by the petitioner, be struck from the record, and (2) that the appeal herein be dismissed.

(1) In support of his Motion to Strike the Statement of Points, respondent respectfully submits that the petitioner had already,

before filing the Statement of Points, perfected his appeal by filing a Petition for Review and Assignments of Error. The petitioner cannot effectually utilize a change in the rules of the Court to raise new issues which were not presented below nor included in his Petition for Review and Assignments of Error. The Rules of the United States Circuit Court of Appeals for the Third Circuit, in Rule 19, governing review of decisions of the Board of Tax
52 Appeals, incorporate the provisions of Rule 75 of the Federal Rules of Civil Procedure. Rule 75 (d) expressly provides for a Statement of Points only if the complete record is not designated for inclusion on appeal. In the above-entitled cause, all material parts of the record have been designated. Since a Statement of Points is obviously not contemplated by the Rules in this case, respondent has filed an Objection to Inclusion of Statement of Points in Record of Appeal, and now urges that the Court strike this Statement from the record.

(2) In support of his Motion to Dismiss the Appeal, respondent respectfully submits that the petitioner has sought review in this Court of a decision of the Board of Tax Appeals holding that respondent was not liable under Section 166 of the Revenue Act of 1934 for a tax on trust income. This issue of tax liability under Section 166 was the only issue before the Board and the only specific ground upon which petitioner rested his Petition for Review and his Assignments of Error. This ground has now been abandoned by petitioner at page 7 of the Brief for Petitioner; thus, it is conceded that the respondent is not liable under Section 166. There is no other issue properly before this Court. The issue of tax liability under Section 22(a) was never raised
53 in the Board of Tax Appeals, and the Statement of Points cannot now be availed of to bring this issue before the Court. Since there is no issue left for determination, respondent moves that the appeal in this case be dismissed.

In addition to the reasons set forth above in paragraphs (1) and (2), respondent refers the Court to the discussion in Point II of the Brief for Respondent and in Support of Motions to Strike and Dismiss heretofore filed.

Respondent respectfully prays that the Honorable Court will hear argument upon these motions when the above entitled cause is called for hearing upon its merits.

Respectfully submitted.

RICHARD H. WILMER,
CARROLL WETZEL,
DOUGLAS L. HATCH.

[File endorsement omitted.]

54 In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Minute entry of hearing

And afterwards, to wit, the 8th day of July 1940, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Albert B. Maris, Honorable Charles Alvin Jones and Honorable Herbert F. Goodrich, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 17th day of July 1940, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

55 In United States Circuit Court of Appeals for the Third Circuit

No. 7418. October Term, 1939

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

O. G. RICHTER, RESPONDENT

On Petition to Review the Decision of the United States Board of Tax Appeals

Opinion

Filed July 17, 1940

Before MARIS, JONES, and GOODRICH, Circuit Judges.

MARIS, Circuit Judge. This is a petition to review a decision of the Board of Tax Appeals. The facts were stipulated and were adopted by the Board as its findings of fact. In December, 1930 the taxpayer created a trust, the income of which was payable to his wife. He designated a trust company as sole trustee and gave the trustee power to hold and invest the trust securities, convert and sell them, reinvest the proceeds, collect interest, income, dividends, and profits and pay the expenses of management. The trust was revocable upon notice by the taxpayer with the written consent of the beneficiary and in any event the trust was to terminate on January 3, 1936, or upon the earlier death of the

settlor or of the beneficiary, whichever should occur first. In 1932 the term was extended to January 3, 1938.

The taxpayer did not at any time have any agreement with his wife that she would give her consent upon his re-
56 quest to the termination of the trust prior to the time specified for its termination. He at no time asked his wife to consent to such termination nor did she at any time offer to give such consent. The wife died on November 26, 1935. The trust was in effect throughout the year 1934. The trustee paid the net income to the wife. The beneficiary reported the income from the trust in her income tax return for 1934 but the taxpayer did not. The Commissioner of Internal Revenue added the net income of the trust to the taxpayer's reported net income and determined a deficiency in his tax for 1934.

The taxpayer appealed to the Board. In his argument before the Board the Commissioner contended that the trust income was taxable to the settlor by virtue of section 166 of the Revenue Act of 1934, 26 U. S. C. A. Int. Rev. Acts sec. 166. The Board ruled that section 166 was inapplicable and decided that there was no deficiency. In his argument before this court the Commissioner concedes that upon authority of Helvering v. Wood, 309 U. S. 344, section 166 is inapplicable, and has abandoned that contention as a ground for reversal of the Board's decision. He now for the first time contends that the trust income was taxable to the settlor by reason of section 22 (a) of the Revenue Act of 1934, 26 U. S. C. A. Int. Rev. Acts sec. 22 (a) as interpreted by the Supreme Court in Helvering v. Clifford, 309 U. S. 331.

The issue presented to the Board was whether section 166 applied to a trust in which the estate reverted to the settlor after a period of years. The stipulated facts were framed with this issue in view. Under section 22 (a) the issue presented is whether the grantor after the establishment of the trust may still be treated as the owner of the corpus. This involves in addition to an analysis of the terms of the trust consideration of all the circumstances attendant on its creation and operation. Helvering v. Clifford, supra. Obviously many facts which would be totally
57 irrelevant to the issue which was presented to the Board might be pertinent and even determinative of the issue now sought to be raised for the first time in this court. The possibility of prejudice to the taxpayer appears to us to be self evident.

In General Utilities Co. v. Helvering, 296 U. S. 200, the Circuit Court of Appeals found in favor of the Commissioner upon a ground not raised before the Board of Tax Appeals. The Supreme Court held this to be error. It said (p. 206):

"The second ground of objection, although sustained by the court, was not presented to or ruled upon by the Board. The

petition for review relied wholly upon the first point; and, in the circumstances, we think the court should have considered no other. Always a taxpayer is entitled to know with fair certainty the basis of the claim against him. Stipulations concerning facts and any other evidence properly are accommodated to issues adequately raised."

Upon a petition for review of a decision of the Board this court's function is to determine whether the Board committed error in its decision of the issues presented to it. Clearly, if an issue was not presented for the Board's determination there is no action upon it by the Board which we can review. Helvering v. Salvage, 297 U. S. 106; Pfeiffer v. Commissioner, 88 F. 2d 3, affirmed 302 U. S. 247; Kottemann v. Commissioner, 81 F. 2d 621; Glassell v. Commissioner, 42 F. 2d 653. It follows that we may not consider the issue now for the first time presented by the Commissioner.

The decision of the Board of Tax Appeals is affirmed.

A true Copy:
Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

58 In United States Circuit Court of Appeals for the Third Circuit

No. 7418—October Term, 1939

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

O. G. RICHTER, RESPONDENT

Judgment

Filed July 17, 1940

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decision of the said Board of Tax Appeals in this cause be, and the same is hereby affirmed.

Philadelphia, July 17, 1940.

ALBERT B. MARIS,
Circuit Judge.

[File endorsement omitted.]

59 [Clerk's certificates to foregoing transcript omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE: 1940

Supreme Court of the United States

Order allowing certiorari

Filed November 18, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted, limited to the first question presented by the petition for the writ.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1941

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FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 17 1940
CHARLES ELMORE CROPLEY
CLERK

No. 516

In the Supreme Court of the United States

OCTOBER TERM, 1940

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

O. G. RICHTER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. —

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

O. G. RICHTER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered in the above cause on July 17, 1940.

OPINIONS BELOW

The memorandum opinion of the United States Board of Tax Appeals (R. 16–17) is not officially reported. The opinion of the United States Circuit Court of Appeals for the Third Circuit (R. 28–30) is not yet officially reported.

JURISDICTION

The judgment of the United States Circuit Court of Appeals was entered July 17, 1940 (R. 30). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The taxpayer transferred securities to a third party in trust to pay the income to his wife. At the end of five years, or earlier if the beneficiary consented, the securities were to be transferred back to the taxpayer. The Board of Tax Appeals held that the grantor was not taxable with respect to the income from the trust. Two questions are presented:

1. Whether, by invoking the general gross income provisions of Section 22, the Commissioner had so changed the theory of the Government's case on appeal as to preclude the Circuit Court of Appeals from considering the issue.

2. Whether, on the merits, the trust income was taxable as income of the grantor under Section 22.

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1934, c. 277, 48 Stat. 680:

> SEC. 22. GROSS INCOME.
>
> (a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in

> whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *
>
> (U. S. C., Title 26, Sec. 22.)

The applicable provisions of Article 166–1 of Regulations 86, as amended, appear in the Appendix, *infra*.

STATEMENT

The facts were stipulated before the Board of Tax Appeals (R. 8–16). The Board adopted the stipulated facts as its findings of fact (R. 16), which may be summarized as follows:

By a trust instrument dated December 29, 1930, the taxpayer placed a group of securities in trust with the Union Trust Company of Pittsburgh, to pay, during the duration of the trust, the net income of the trust to Nannie C. Richter, the taxpayer's wife, in such installments as she might request. Provision for termination of the trust was as follows (R. 11–12):

> The Donor reserves the right to terminate this trust at any time during the continuance hereof with the consent of the beneficiary, and not otherwise, by giving thirty days notice in writing of his intention so to do, accompanied by the written consent of the

beneficiary, served upon the Donor, which thirty day period of notice may be waived by the Trustee, and, upon the exercise of this power of revocation, this trust shall and the moneys, securities, and properties then held under the terms hereof, shall be transferred, assigned and delivered to the Donor, or his nominee or nominees, and the receipt of the said Donor, or his nominee or nominees, shall be full and sufficient discharge of the Trustee with respect thereto.

In the event that this trust is not sooner terminated as above provided, it shall end on January 3, 1936, and the original corpus and additions, if any made thereto subsequently by the Donor, shall be paid, assigned, transferred, and delivered to the Donor as hereinbefore provided; and, in the event of the death of the Donor or the cestui que trust during the continuance of this trust, such decease shall operate as a revocation and the original corpus and any additions, if any made thereto subsequently by the Donor, shall be transferred, assigned, and paid over to the Donor or his legal representatives, discharged of the trust herein.

By instrument dated June 3, 1932 (R. 15–16), the taxpayer extended the term of the trust to January 3, 1938, provided that the trust was not sooner terminated by act of the taxpayer-settlor and consent of the beneficiary, or by death of the settlor or beneficiary. The taxpayer did not at any time have any agreement with his wife that she would join with him upon his request for a

termination of the trust prior to the time specified for its termination. Taxpayer at no time asked his wife to join in an agreement for termination, and she at no time offered to join with him in any agreement for termination. Taxpayer's wife died on November 26, 1935 (R. 9, 10).

The trust was in effect throughout the year 1934, and the trustee paid the entire net income of the trust for that year to taxpayer's wife (R. 9, 10). In determining the income tax liability of the taxpayer for the calendar year 1934, the Commissioner attributed the income of the trust to the taxpayer and determined a deficiency accordingly.

The taxpayer sought review in the Board of Tax Appeals, where the Commissioner undertook to defend his determination on two grounds: (1) that the income was taxable to the grantor under Section 166 of the Revenue Act of 1934; and (2) that the grantor retained such substantial incidents of ownership in the corpus as to render him taxable upon the income therefrom under Article 166–1 of Regulations 86, as amended.[1] The Board held the grantor not taxable.

Upon appeal to the Circuit Court of Appeals, the Commissioner again urged not only that the grantor was taxable under Section 166 of the 1934 Act, but

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[1] This second theory appears as Point III of the brief filed by the Commissioner with the Board of Tax Appeals.

also that the income was attributable to him under Article 166–1 of Regulations 86, as amended (R. 20, 23). However, subsequently, as a result of this Court's supervening decisions in *Helvering* v. *Clifford*, 309 U. S. 331, and *Helvering* v. *Wood*, 309 U. S. 344, the Commissioner waived reliance upon Section 166, but sought to have the income taxed under Section 22 (a), which contained the statutory provisions supporting Article 166–1 of Regulations 86, previously relied upon. The Circuit Court of Appeals refused to consider Section 22 (a) on the theory that it was being raised for the first time on appeal, and affirmed the decision of the Board.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding and deciding that the income derived from the Nannie C. Richter Trust during the calendar year 1934 was not taxable to the grantor, O. G. Richter.

2. In failing to hold and decide that the income of the Nannie C. Richter Trust for the calendar year 1934 was taxable to the grantor as his income in the year 1934.

3. In failing to hold that the trust income was taxable to the grantor under Article 166–1 of Treasury Regulations 86, as amended.

4. In failing to hold that the foregoing provisions of Article 166–1 are supported by Section 22 (a) of the Revenue Act of 1934.

5. In holding that the applicability of Section 22 (a), *supra*, involved a new issue which could not be presented on appeal.

6. In failing to hold that the taxability of the trust income to the grantor was, in a broad sense, the issue before the Board of Tax Appeals.

7. In failing to reverse the decision of the Board of Tax Appeals.

REASONS FOR GRANTING THE WRIT

1. In denying the Government the right to rely upon the general provisions of Section 22 (a) merely because they had not been specifically mentioned before the Board, the decision of the court below is in conflict with *Helvering* v. *Hormel,* 111 F. (2d) 1 (C. C. A. 8th), certiorari granted, October 14, 1940, No. 257, present Term.

2. This case presents an important question as to the scope of review in the circuit courts of appeals which is in need of clarification.

The Government relied upon the amended provisions of Article 166–1 of Regulations 86 (see Appendix, p. 10, *infra*) in the Board of Tax Appeals. Upon appeal, it continued to rely upon the same provisions, and brought the case into sharper focus by invoking Section 22 (a) of the Revenue Act of 1934 which afforded statutory support for those provisions. There was no change in theory upon which taxability was predicated. The theory of taxability was the same whether couched in terms of Article 166–1 or in terms of Section 22

(a), as construed in *Helvering* v. *Clifford,* 309 U. S. 331.[2] The Government's position on appeal involved no additional elements to be considered, since the same criteria of taxability set forth in the *Clifford* decision were likewise contained in Article 166–1. There was simply a shift of emphasis from the regulations to the statute, the theory of taxability remaining unchanged.

---

[2] The Court in the *Clifford* case put aside the consideration of Article 166–1, since the amended provisions had been promulgated after the tax year in question. 309 U. S. at 334, n. 1. Although the tax year here likewise preceded the amendment, the Government nevertheless did in fact rely upon the amended regulations in the Board, so that, at least for the purpose of scope of review, it cannot be said that the Government changed the theory of the tax upon appeal when it simply invoked Section 22 (a), which was the statutory basis for the amended regulations.

Moreover, even though the Court in the *Clifford* case found it unnecessary to rest its decision upon the amended regulations, they were nevertheless applicable, unless invalid, to the tax year in question. The regulations involved were Regulations 86, which governed income-tax liability under the Revenue Act of 1934, *i. e.*, income-tax liability for the years 1934 and 1935. (The year 1936 and later years were governed by the Revenue Act of 1936 and later Acts.) The 1936 amendment to Regulations 86, here involved, would have been entirely without meaning unless it were to apply to the years ruled by the 1934 Act (*i. e.*, 1934 and 1935). And the scheme of the revenue acts contemplates that changes in regulations are to relate to all tax years governed by the regulations unless the Secretary of the Treasury or the Commissioner affirmatively provide that the change shall have only prospective application. Section 1108 (a) of the Revenue Act of 1926 (c. 27, 44 Stat. 9), as amended by Section 506 of the Revenue Act of 1934, specifically provides

It would seem that the court below unduly limited its power of review. And since scope of review in somewhat similar situations frequently confronts the circuit courts of appeals, it is a matter of considerable importance to obtain clarification of their power in such circumstances.

CONCLUSION

Therefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

FRANCIS BIDDLE,
Solicitor General.

OCTOBER 1940.

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that "The Secretary, or the Commissioner with the approval of the Secretary, may prescribe the extent, if any, to which any ruling, regulation, or Treasury Decision, relating to the internal revenue laws, shall be applied without retroactive effect." See *Morrissey* v. *Commissioner*, 296 U. S. 344; but cf. *Helvering* v. *Reynolds Tobacco Co.*, 306 U. S. 110. Unlike the amended regulations in the *Reynolds* case, however, the amended regulations here created no new rule of liability: the amended regulations here simply sharpened the legal theory upon which income theretofore attributed to the grantor was to be included in his gross income.

APPENDIX

Treasury Regulations 86, promulgated under the Revenue Act of 1934:

> ART. 166–1 [as amended by T. D. 4629, XV–1 Cum. Bull. 140, 141 (1936), and T. D. 4759, 1937–2 Cum. Bull. 117, 118]. *Trusts, with respect to the corpus of which, the grantor is regarded as remaining in substance the owner.*—(a) If the grantor of a trust is regarded, within the meaning of the Act, as remaining in substance the owner of the corpus thereof, the income therefrom is not taxable in accordance with the provisions of sections 161, 162, and 163 but remains attributable and taxable to the grantor. This article deals with the taxation of such income. As used in this article, the term "corpus" means any part or the whole of the property, real or personal, constituting the subject matter of the trust.
>
> (b) * * *
>
> But the provisions of section 166 are not to be regarded as excluding from taxation to the grantor the income of other trusts, not specified therein, in which the grantor is, for the purposes of the Act, similarly regarded as remaining in substance the owner of the corpus. The grantor is regarded as in substance the owner of the corpus, if, in view of the essential nature and purpose of the trust, it is apparent that the grantor has failed to part permanently and definitively with the substantial incidents of ownership in the corpus.

In determining whether the grantor is in substance the owner of the corpus, the Act has its own standard, which is a substantial one, dependent neither on the niceties of the particular conveyancing device used, nor on the technical description which the law of property gives to the estate or interest transferred to the trustees or beneficiaries of the trust. In that determination, among the material factors are: the fact that the corpus is to be returned to the grantor after a specific term; the fact that the corpus is or may be administered in the interest of the grantor; the fact that the anticipated income is being appropriated in advance for the customary expenditures of the grantor or those which he would ordinarily and naturally make; and any other circumstances bearing on the impermanence and indefiniteness with which the grantor has parted with the substantial incidents of ownership in the corpus.

Thus the grantor is regarded as being in substance the owner of the corpus if, in any case, the trust amounts to no more than an arrangement whereby the grantor, in the ordering of his affairs, finds it expedient to entrust for a period the title to, and custody or management of, certain of his property to a trustee, the income from such property to be used by the trustee during such period to make those expenditures which the grantor would customarily or ordinarily or naturally make and to which the grantor chooses to commit himself in advance, while the corpus is to be held intact, for return in due course to the grantor. In such a case, it is immaterial that, at the time of the creation of the trust, an irrevocable disposition or consummated gift was made of those property rights

which consist of the right to the expected future income of the corpus for the specified period. On the other hand, if the grantor, incident to a definitive and permanent disposition of certain of his property, creates the trust in order to conserve the property, not for himself but for the donees, who will ultimately enjoy it, the provisions of sections 161, 162, and 163 are applicable.

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No. 816

In the Supreme Court of the United States

October Term, 1940

GUY T. HELVERING, Commissioner of Internal Revenue, Petitioner,

v.

O. G. HARMEL

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 516

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

O. G. RICHTER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The memorandum opinion of the United States Board of Tax Appeals (R. 16–17) is not reported. The opinion of the Circuit Court of Appeals for the Third Circuit (R. 28–30) is reported in 114 F. (2d) 452.

JURISDICTION

The judgment of the United States Circuit Court of Appeals was entered on July 17, 1940 (R. 30). The petition for a writ of certiorari was filed on October 17, 1940, and was granted on November 18, 1940, limited to the first of the two questions presented. The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The taxpayer transferred securities to a third party in trust to pay the income to his wife. At the end of five years, or earlier if the wife consented, or on the death of the taxpayer or his wife, the securities were to be transferred back to the taxpayer. The Board of Tax Appeals held that the grantor was not taxable with respect to the income from the trust. Only one question is here presented:

Whether, by invoking the general gross income provisions of Section 22, the Commissioner had so changed the theory of the Government's case on appeal as to preclude the Circuit Court of Appeals from considering the issue.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the statutes and regulations involved are set forth in the Appendix E, *infra*, pp. 61–70.

STATEMENT

The facts stipulated by the parties (R. 8–16) were adopted by the Board of Tax Appeals as its findings of fact (R. 16). They may be summarized as follows:

By a trust instrument dated December 29, 1930, the taxpayer placed a group of securities in trust with the Union Trust Company of Pittsburgh, to pay, during the duration of the trust, the net income of the trust to Nannie C. Richter, the tax-

payer's wife, in such installments as she might request.

Unless revoked sooner, either by the act of the taxpayer with the consent of the beneficiary, or by death of the taxpayer or the beneficiary, the trust was to terminate on January 3, 1936; upon termination, the original corpus plus subsequent additions thereto was to be delivered to the taxpayer free of the trust (R. 11–12).

By instrument dated June 3, 1932 (R. 15–16), the taxpayer extended the term of the trust to January 3, 1938, provided that the trust was not sooner terminated by act of the taxpayer with the consent of the beneficiary, or by death of the taxpayer or beneficiary. The taxpayer did not at any time have any agreement with his wife that she would join with him upon his request for a termination of the trust prior to the time specified for its termination. Taxpayer at no time asked his wife to join in an agreement for termination, and she at no time offered to join with him in any agreement for termination. Taxpayer's wife died on November 26, 1935 (R. 9, 10).

The trust was in effect throughout the year 1934, and the trustee paid the entire net income of the trust for that year to taxpayer's wife (R. 9–10). In determining the income tax liability of the taxpayer for the calendar year 1934, the Commissioner

attributed the income of the trust to the taxpayer and determined a deficiency accordingly (R. 4–7).[1]

The taxpayer petitioned for a redetermination of of the deficiency by the Board of Tax Appeals, asserting that "The Commissioner of Internal Revenue erred in including in the income of petitioner the net income arising under the trust established by the petitioner on December 29, 1930, as amended June 3, 1932, the beneficiary of which was his wife, Nannie C. Richter" (R. 3). The Commissioner in his answer denied the alleged error (R. 8). A stipulation of facts was filed on December 6, 1938, reserving to each party "the right to introduce any other evidence not inconsistent therewith" (R. 1, 8–16), and the time for filing briefs was set as follows: "Petitioner's brief due 1/5/39. Commissioner's brief due 2/4/39. Petitioner's reply due 2/20/39". (R. 1).

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[1] The Commissioner in his ninety-day deficiency letter, stated (R. 7):

"EXPLANATION OF CHANGES

"In accordance with the recommendation of the revenue agent, your return has been adjusted to include the net income of the trust created by you in 1930 for the benefit of your wife, Nannie C. Richter.

"The record indicates that under the provisions of section 166 of the Revenue Act of 1934 the trust created by you in 1930 for the benefit of your wife, Nannie C. Richter, was a revocable trust and, therefore, the net income is taxable to the grantor. In accordance with the provisions of the trust instrument, the trust could be terminated by you at any time with consent of the beneficiary and the title to the corpus would revest in the grantor upon the exercise of such power. The trust terminated on January 3, 1936, the corpus reverting to the grantor."

The Commissioner in his brief undertook to defend his determination on two grounds: (1) That the income was taxable to the grantor under Section 166 of the Revenue Act of 1934; and (2) that the grantor retained such substantial incidents of ownership in the corpus as to render him taxable upon the income therefrom under Article 166–1 of Regulations 86, as amended by Treasury Decision 4629 (1936). Appendix A, *infra*, pp. 54–55. The taxpayer in his reply brief stated (Appendix B, *infra*, p. 57):

> It is to be noted that, in the Commissioner's deficiency letter (Petition, paragraph 2 and Exhibit A thereto), the position was taken that the trust involved "was a revocable trust and, therefore, the net income is taxable to the grantor." The respondent seems to have definitely abandoned the position that this is a revocable trust, * * *.

The taxpayer then discussed the merits of the Commissioner's position, as follows (Appendix B, *infra*, p. 57): [2]

> The next step [in the Commissioner's argument] * * * is that there was a regulation

[2] Later, the taxpayer added: "As sought to be applied by the respondent in this case, Regulations 86 ignore completely the language of the Congress, whereby it provided for the taxability of the income arising under a trust where the grantor 'had the power', and fail utterly, if the present interpretation thereof sought to be applied be correct, to distinguish between the 'termination' of the trust by its own terms and the 'revocation' of the trust by some unfettered act of the grantor before its automatic termination under express provisions of the trust instrument." Appendix B, *infra*, p. 58.

> in effect in 1934 (part of Article 166–1, Regulations 86) providing that the grantor is regarded as in substance the owner of the corpus if it is apparent that he has failed to part permanently and definitively with the substantial incidents of ownership in the corpus, and that, the petitioner being in substance the owner of the corpus because it will ultimately come back to him, the income is taxable to him. The answer to this proposition is plain: The regulation as sought to be applied in this case goes beyond the pertinent statutory provision itself, and, seeking to make taxable what was expressly excluded from taxation by the statute itself, is null and void. * * *

The Board held the taxpayer-grantor was not taxable.

Upon appeal to the Circuit Court of Appeals, the Commissioner again urged not only that the grantor was taxable under Section 166 of the 1934 Act, but also that the income was attributable to him under Article 166–1 of Regulations 86, as amended by Treasury Decision 4629 (1936) (R. 20, 23). However, subsequently, as a result of this Court's supervening decisions in *Helvering* v. *Clifford*, 309 U. S. 331, and *Helvering* v. *Wood*, 309 U. S. 344, the Commissioner waived reliance upon Section 166, but sought to have the income taxed under Section 22 (a), which contained the statutory provisions supporting Article 166–1 of Regulations 86, as amended by Treasury Decision 4629 (1936), previously relied upon. Appendix C, *infra*, p. 59. The Circuit Court of Appeals refused to consider Section 22 (a) on the theory that it was being raised for the first

time on appeal, and affirmed the decision of the Board (R. 29, 30).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding and deciding that the income derived from the Nannie C. Richter Trust during the calenday year 1934 was not taxable to the grantor, O. G. Richter.

2. In failing to hold and decide that the income of the Nannie C. Richter Trust for the calendar year 1934 was taxable to the grantor as his income in the year 1934.

3. In failing to hold that the trust income was taxable to the grantor under Article 166–1 of Treasury Regulations 86, as amended.

4. In failing to hold that the foregoing provisions of Article 166–1 are supported by Section 22 (a) of the Revenue Act of 1934.

5. In holding that the applicability of Section 22 (a), *supra*, involved a new issue which could not be presented on appeal.

6. In failing to hold that the taxability of the trust income to the grantor was, in a broad sense, the issue before the Board of Tax Appeals.

7. In failing to reverse the decision of the Board of Tax Appeals.

SUMMARY OF ARGUMENT

I

The Government under a separate heading in its brief before the Board argued that the taxpayer had

failed to part definitively with the substantial incidents of ownership in the corpus and should be regarded as remaining in substance the owner of the corpus of the trust within the meaning of Article 166–1 of Regulations 86 as amended by Treasury Decision 4629 (1936). The taxpayer did not object to the Board's consideration of the issue or theory of substantial ownership. His reply brief first observes that the Commissioner "seems to have definitely abandoned the position that this is a revocable trust * * *." It then states and answers on the merits the broader position taken by the Commissioner before the Board. At no time did the taxpayer contend before the Board that he was prejudiced or surprised by the Commissioner's reliance upon this broad issue of substantial ownership.

The ninety-day letter of the Commissioner, it is true, explains the deficiency by stating only that under Section 166 the trust was a revocable trust. But it is clear beyond doubt that the reasons given in the Commissioner's deficiency letter in no way limit the issues or theories that may be raised before the Board. The question there is not whether the Commissioner's course of reasoning was correct but whether his determination was correct, irrespective of the reasons advanced to support it.

The Board's rules of practice show that the issues on an appeal are determined by the pleadings of the parties. The petition and answer in this case disclose that the issue before the Board was the broad question whether the trust income was taxable to the taxpayer-settlor. The subsequent hearing and argu-

ment offered opportunity to the parties to adduce the facts and present their legal theories with respect to them. But in this case the hearing was merely *pro forma:* the facts had been stipulated in advance, and the stipulation was admitted into evidence at the hearing without argument or explanation. The briefs filed with the Board, therefore, presented the first occasion for either party to crystallize the legal theories with respect to the transaction of trust under consideration. From the standpoint of settled Board practice, the propriety of advancing a theory for the first time in a brief filed with the Board cannot be doubted. Moreover, the Board's opinion nowhere states in terms that the broad theory of substantial ownership was not raised before it.

Article 166–1 of Regulations 86 as amended in 1936 was, unless invalid, fully applicable to the tax year in question. The Revenue Act of 1934 under which Regulations 86 were promulgated governs only the years 1934 and 1935. The 1936 amendment to these regulations would therefore have been entirely without meaning unless it were to apply to the years 1934 and 1935. The scheme of the revenue acts, moreover, contemplates that changes in the regulations are to relate to all tax years governed by the regulations unless the Secretary of the Treasury or the Commissioner affirmatively provides that the change shall have only prospective application.

There is no basis in reason for regarding Article 166–1 as amended in 1936 other than as valid. The criteria there stated to be controlling created no

new rule of liability. The 1936 amendment, by relying upon Section 22 (a), merely sharpened the legal theory upon which income theretofore attributed to the taxpayer-grantor of a trust was to be included in his gross income. *Helvering* v. *Clifford*, 309 U. S. 331, shows that the amended article, as well as the original, is well within the area of discretion conferred by Congress on the Commissioner.

Helvering v. *Wood*, 309 U. S. 344, is not controlling here. In the circumstances there presented the Commissioner could well be deemed to have narrowed the issue to the construction of Section 166 and to have abandoned the theory of substantial ownership except insofar as supported by Section 166. The cases cited and the reasoning followed in the opinion indicate that the *Wood* decision was intended to govern only the practice in this Court, not the practice in the circuit courts of appeals. The emphasis in the opinion upon the *waiver* in the circuit court of appeals suggests that in the absence of such waiver, as in the case here, the point would have been open both in that court and in this Court. In the case at bar, on the contrary, the theory of substantial ownership embodied in Article 166–1 as amended was never narrowed or abandoned but was fully argued before the Board. The Commissioner upon appeal may therefore advance a new reason—Section 22 (a)—to support the validity of his regulations.

It is likewise clear that the court below should have considered Section 22 (a) as construed in *Helvering*

v. *Clifford*, 309 U. S. 331. The amended regulations upon which the Commissioner relied both before the Board and the Circuit Court of Appeals rest in part upon Section 22 (a). They also express the same theory as to tax liability which is expressed by Section 22 (a) as construed in the *Clifford* case. It may be noted, moreover, that Section 22 (a) would be before the Circuit Court of Appeals even were the amended regulations declared invalid. The Commissioner, whether justified or not, did place his reliance upon the amended regulations. By so doing, he framed the issue in terms as broad as that framed by Section 22 (a) and gave notice, to all who read the amended regulations, that the ultimate statutory basis for taxability was other than Section 166.

II

The result should be the same even though it be assumed, for purposes of argument, that "the issue presented to the Board was whether Section 166 applied to a trust in which the estate reverted to the settlor after a period of years" and that "the stipulated facts were framed with this issue in view." The Government contends that even so the court below had power to dispose of the case under Section 22 (a) and, in the circumstances, should be directed to exercise that power.

This Court has settled that an appellee may support the determination of the Board of Tax Appeals upon a new issue, raised for the first time upon

appeal, even though the consideration of that issue requires that the case be remanded. *Helvering* v. *Gowran*, 302 U. S. 238, 245–246, and cases therein cited. One may therefore question the existence of any blanket rule denying that there is power to consider a new issue raised on appeal by an appellant. The decisions of the Court also show that it has no want of power to reverse a judgment under review upon a theory not theretofore presented. A recent example in the tax field is *Helvering* v. *Leonard*, 310 U. S. 80, 83. Another situation in which this has been done is shown by *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, and *Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202. During this Term the Court has asserted its power to consider errors of a fundamental nature whether raised or not. *Sibbach* v. *Wilson & Company, Inc.*, No. 28, this Term, and cases therein cited. And the rule has been laid down that a supervening change in law or fact is substantial ground for reversing a judgment right when made. *Vandenbark* v. *The Owens-Illinois Glass Co.*, No. 141, this Term, and cases therein cited; *Gulf, Colorado & S. F. Ry.* v. *Dennis*, 224 U. S. 503, and cases therein cited. A somewhat analogous practice is found in the settled rule that this Court, without finally disposing of a case, has power to remand the case where the trial was had upon the wrong theory or the record does not permit of final disposition with justice to all parties. E. g., *United States* v. *Shelby Iron Co.*, 273 U. S. 571, 579; *United States* v. *Rio Grande Dam Co.*, 184 U. S.

416, 423; 215 U. S. 266, 275; *Combs* v. *Hodge*, 21 How. 397, 408.

This Court has never laid down a blanket rule prohibiting a circuit court of appeals from considering any issue except one fully argued before the Board. *General Utilities Co.* v. *Helvering*, 296 U. S. 200, stands for no such proposition. The opinion there refers to the merits of the new issue not argued before the Board and indicates that, unless the Commissioner's position is lacking in merit, the case may be remanded to the Board for disposition upon the correct rule of law. Accord: *Helvering* v. *Salvage*, 297 U. S. 106, 107. Reversal of the Board upon a new issue is supported by the statutory command that, "if the decision of the Board is not in accordance with law," the circuit court of appeals shall have power to dispose of the case "as justice may require". Compare *Helvering* v. *Taylor*, 293 U. S. 507; *Legg's Estate* v. *Commissioner*, 114 F. (2d) 760, 767 (C. C. A. 4th). The existence of the power to reverse a decision of the Board upon a new issue or theory has been affirmed on numerous occasions by the various circuit courts of appeals. *Legg's Estate* v. *Commissioner*, 114 F. (2d) 760, 767 (C. C. A. 4th), and cases therein cited.

The Circuit Court of Appeals, assuming it has the power, should be directed to dispose of this case under Section 22 (a). The situation here (viewed most favorably to the taxpayer) discloses that a theory of liability—substantial ownership under

Section 22 (a)—which might have been raised either by the parties or the Board was overlooked and not directly called to the Board's attention. Since its disposition of the case, however, a supervening decision of this Court has shown that this theory beyond doubt is applicable and probably is determinative of the merits in favor of the Commissioner.

The leading authority as to the correct practice to be followed by the circuit courts of appeals—the *General Utilities* case—lends support to our position. By referring to the merits of the new issue, the opinion indicates that, even in the situation there disclosed, the proceeding may be remanded to the Board in the event the Commissioner's position is meritorious. Compare *Helvering* v. *Salvage*, 297 U. S. 106, 109. The case, in any event, does not militate against us. The issue there sought to be raised required an investigation of a transaction distinct from the transaction relevant to the issue before the Board and required "an inference of fact directly in conflict with the stipulation of the parties and the findings." Here, quite to the contrary, a disposition of the case under Section 22 (a) may be made without the investigation of any transaction other than the transaction of trust considered by the Board and without the consideration of any facts other than the stipulated facts and findings. This case, therefore, comes directly within the rationale of numerous cases in the circuit courts of appeals where the Commissioner was sustained upon a new

theory predicated upon the facts in the record as to the transaction under consideration.

Finally, we submit, the instances in which this Court has ordered that disposition of a case be made in the light of a supervening decision, or change in the law or in the facts, are ample warrant for our position in the case at bar. *Blair* v. *Commissioner*, 300 U. S. 5; *Vandenbark* v. *The Owens-Illinois Glass Co.*, No. 141, this Term, and cases therein cited. The action of the parties and the Board shows that, even though embodied in the regulations, the theory of liability spelled out in the *Clifford* case was not well understood or established at the time of the Board hearing. The *Clifford* decision is therefore comparable in all essential respects to the supervening decisions relied upon in numerous cases before this Court.

ARGUMENT

The Government took the position before the Circuit Court of Appeals that under Section 22 (a) of the Revenue Act of 1934 the income from the trust for his wife was taxable to the taxpayer-settlor. Its contention was not given consideration. Instead, the Government was told, in effect, that the taxpayer's liability, even if it could be proved beyond a doubt, was forever barred because the transaction under consideration was presented to the Board of Tax Appeals upon the issue "whether section 166 applied to a trust in which the estate reverted to the settlor after a period of years" (R. 29). The

Circuit Court of Appeals reached this result without specific mention of what other facts, if any, could possibly have been brought forward by the taxpayer (at the original hearing before the Board) adequate to overcome the effect of the stipulated facts and avoid taxability under Section 22 (a).

The Government's argument here is twofold: we contend (1) that the issue or theory that the taxpayer-settlor should be "regarded as remaining in substance the owner of the corpus" presented by Article 166–1 as amended and by Section 22 (a) [3] was raised and argued before the Board and was properly before the Circuit Court of Appeals; and (2) that, in any event, the Circuit Court of Appeals could and should have considered and disposed of the case under Section 22 (a).

I

THE THEORY PRESENTED BY ARTICLE 166–1 AS AMENDED AND BY SECTION 22 (A) WAS RAISED AND ARGUED BEFORE THE BOARD AND WAS PROPERLY BEFORE THE CIRCUIT COURT OF APPEALS

1. The Government under a separate heading [4] in its brief before the Board opened its argument with the following statement (Appendix A, *infra*, pp. 54–55):

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[3] The Circuit Court of Appeals stated (R. 29): "Under Section 22 (a) the issue presented is whether the grantor after the establishment of the trust may still be treated as the owner of the corpus."

[4] The heading reads:

"*The provisions of Article 166–1 of Regulations 86, as amended, require that the income of the present trust be taxed to petitioner.*"

The facts of the instant case bring them squarely within the scope of Article 166–1 of Regulations 86, as amended by Treasury Decision 4629, *supra*, and specifically that part of the regulations which provides as follows:

"But the provisions of section 166 are not to be regarded as excluding from taxation to the grantor the income of other [5] trusts, not specified therein, in which the grantor is, for the purposes of the Act, similarly regarded as remaining in substance the owner of the corpus. The grantor is regarded as in substance the owner of the corpus if, in view of the essential nature and purpose of the trust, it is apparent that the grantor has failed to part permanently and definitively with the substantial incidents of ownership in the corpus."

It is apparent from the nature of the trust that petitioner has failed to part permanently and definitively with the substantial incidents of ownership in the corpus of the trust. * * * [The Commissioner then urged that the regulations were reasonable and supportable under Section 166 and that they were applicable to the facts of this case.]

The portions thus quoted from Regulations 86 show on their face that Article 166–1 as amended is not based solely upon Section 166 nor confined to the

[5] In a preceding paragraph, Article 166–1 as amended states (Appendix E, *infra*, p. 62):

"(b) Section 166 defines with particularity instances in which the grantor is regarded as in substance the owner of the corpus by reason of the fact that he has retained power to revest the corpus in himself. * * *"

types of trusts therein specified. Rather, as this Court recognized in *Helvering* v. *Clifford*, 309 U. S. 331, 334n., they show that "Article 166–1 of Treasury Regulations 86 promulgated under § 166 of the 1934 Act" was "in 1936 amended (T. D. 4629) so as to rest on § 22 (a) also." Moreover, even a casual reading of the amended regulations discloses the following description of the governing criteria (Appendix E, *infra*, p. 63):

> In determining whether the grantor is in substance the owner of the corpus, the Act has its own standard, which is a substantial one, dependent neither on the niceties of the particular conveyancing device used, nor on the technical description which the law of property gives to the estate or interest transferred to the trustees or beneficiaries of the trust. In that determination, among the material factors are: the fact that the corpus is to be returned to the grantor after a specific term; the fact that the corpus is or may be administered in the interest of the grantor; the fact that the anticipated income is being appropriated in advance for the customary expenditures of the grantor or those which he would ordinarily and naturally make; and any other circumstances bearing on the impermanence and indefiniteness with which the grantor has parted with the substantial incidents of ownership in the corpus.

These criteria are then illustrated so as to leave no doubt as to their applicability to the case at bar, as follows (Appendix E, *infra*, p. 64):

> (c) For example, a grantor is regarded as remaining in substance the owner of the corpus of the trust, if he has placed it in trust for his son, John.
>
> "(A) for the term of three years, at the end of which time the trust might be extended for a like period at the option of the grantor and successively thereafter, but in the absence of such an extension the title is once more to revest in the grantor in possession and enjoyment; * * *."

It is clear that the Commissioner by thus relying upon Article 166–1, as amended in 1936, injected into the case prior to its consideration by the Board the theory that the taxpayer-settlor in view of the nature of the trust should be regarded as in substance the owner of the trust corpus. It would, we submit, be difficult to present this theory more plainly.

The taxpayer at no time objected to the Board's consideration of this theory of substantial ownership of the trust corpus. Instead, he stated the broad position of the Commissioner and answered it on the merits. The reply brief for the taxpayer before the Board first observes (Appendix B, *infra*, p. 57):

> It is to be noted that, in the Commissioner's deficiency letter (Petition, paragraph 2 and Exhibit A thereto), the position was taken that the trust involved "was a revocable trust and, therefore, the net income is taxable to the grantor." The respondent seems to have definitely abandoned the position that this is a revocable trust, * * *.

The taxpayer's brief then discusses the merits of the Commissioner's contentions, as follows (Appendix B, *infra*, p. 57):

> The next step [in the Commissioner's argument] * * * is that there was a regulation in effect in 1934 (part of Article 166–1, Regulations 86) providing that the grantor is regarded as in substance the owner of the corpus if it is apparent that he has failed to part permanently and definitively with the substantial incidents of ownership in the corpus, and that, the petitioner being in substance the owner of the corpus because it will ultimately come back to him, the income is taxable to him. The answer to this proposition is plain: The regulation as sought to be applied in this case goes beyond the pertinent statutory provision itself, and, seeking to make taxable what was expressly excluded from taxation by the statute itself, is null and void. * * *

At no time did the taxpayer argue before the Board that he was prejudiced or surprised by the Commissioner's reliance upon the amended regulations or that an opportunity should be given to him to adduce other facts. Compare *Helvering* v. *Edison Securities Corp.*, 78 F. (2d) 85 (C. C. A. 4th); *Underwood* v. *Commissioner*, 56 F. (2d) 67 (C. C. A. 4th); *Bankers Realty Syndicate*, 20 B. T. A. 612.[6]

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[6] Compare the cases permitting amendment of the petition or answer after submission of the case, but prior to decision: *Minnesota Tea Co.* v. *Commissioner*, 76 F. (2d) 797 (C. C. A. 8th), aff'd, 296 U. S. 378; 34 B. T. A. 145, rev'd, 89 F. (2d) 711, aff'd, 302 U. S. 609; *Excelsior Motor Mfg. & Supply Co.* v. *Commissioner* 43 F. (2d) 968 (C. C. A. 7th); *Enameled Metals Co.* v. *Commissioner*, 42 F. (2d) 213 (C. C. A. 3d).

2. The Circuit Court of Appeals (R. 29) remarked that "The issue presented to the Board was whether section 166 applied to a trust in which the estate reverted to the settlor after a period of years. The stipulated facts were framed with this issue in view." This statement, if construed to mean that such issue or theory of liability was the sole one before the Board, is not correct and must be the result of a misunderstanding. The Board nowhere states in terms that such a theory was the only one before it (R. 17). In truth it could not make such a finding. The briefs of the parties quoted immediately above show that a much broader question was presented to and argued before the Board prior to the Board's consideration of the case. There is nothing to suggest, and much to refute, the assumption that the taxpayer was in any way prejudiced or misled as to the scope of the issue before the Board.

The ninety-day letter of the Commissioners, it is true, explains the deficiency by stating only that under Section 166 the trust was a revocable trust (R. 7). But it is beyond doubt that the reasons given in the Commissioner's deficiency letter do not in any way operate as a limitation upon the scope of the issues or theories that may be raised before the Board. The appeal to the Board is from a final determination of a deficiency, not from the ninety-day letter, and the question there is not whether the Commissioner gave the right reason for his conclusion but whether he reached the right determination, whatever course of reasoning he may have followed.

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Helvering v. *Gowran*, 302 U. S. 238, 246; *Alexander Sprunt & Son* v. *Commissioner*, 64 F. (2d) 424, 427 (C. C. A. 4th).[7]

Furthermore, the Board's rules of practice indicate that the issues on appeal to the Board are determined by the pleadings of the parties.[8] Rules 6, 14, 15, 16, 17, 18, and 30, *infra*, Appendix E, pp. 69–70. The petition and answer in this case disclosed that the issue before the Board was the broad one as to the taxability of the trust income to the taxpayer-settlor (R. 3–8). The petition after setting forth the facts of the case alleges at item 4 (a) (R. 3) that—

> The determination of tax set forth in said notice of deficiency is based upon the following errors: (a) The Commissioner of Internal

[7] "It is immaterial whether the commissioner proceeded upon the wrong theory in determining the deficiency. In any event the burden was on petitioner to show that the assessment was wrong." *J. & O. Altschul Tobacco Co.* v. *Commissioner*, 42 F. (2d) 609, 610 (C. C. A. 5th). Accord: *Atlantic Bank & Trust Co.* v. *Commissioner*, 59 F. (2d) 363 (C. C. A. 4th); *James P. O'Laughlin*, 30 B. T. A. 1327; *Gossett* v. *Commissioner*, 22 B. T. A. 1279, aff'd on another issue, 59 F. (2d) 365, 60 F. (2d) 484 (C. C. A. 4th); *Edgar M. Carnrick*, 21 B. T. A. 12, 21.

[8] The statutory authority for the rules of the Board is found in Section 907 (a) of the Revenue Act of 1924, as amended, *infra*, Appendix D, p. 66. See *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117.

> Revenue erred in including in the income of petitioner the net income arising under the trust established by the petitioner on December 29, 1930, as amended June 3, 1932, the beneficiary of which was his wife, Nannie C. Richter.

The answer of the Commissioner constitutes in effect a general denial (R. 8). Thus the question was squarely presented to the Board of Tax Appeals whether the trust income was taxable to the settlor. The hearing and subsequent briefs offered the first occasion for the parties to bring out the facts and present the legal theories with reference to them. But in the case at bar the hearing was entirely *pro forma:* the stipulation was agreed upon in advance and made a part of the record, without further testimony or argument before the Board Member (Appendix D, *infra*, p. 60). Hence it was not until the briefs were actually filed that the questions of law respecting the taxability of the trust income could be crystallized. Likewise from the standpoint of settled Board practice there is no doubt that the theory of substantial ownership could properly be advanced in the briefs. *Helvering* v. *Bowen*, 85 F. (2d) 926 (C. C. A. 4th). See *Schweitzer* v. *Commis-*

sioner, 75 F. (2d) 702 (C. C. A. 7th), reversed on other grounds, 296 U. S. 551.[9]

Moreover, it may be noted, the stipulation of facts was entered into some nine months after the pleadings were filed (R. 8–16). The taxpayer, if dissatisfied with the breadth of the question framed by the pleadings, could have moved under Rule 18.[10]

[9] See Charles E. Clark, Handbook of the Law of Code Pleading (p. 30):

> The aim of pleadings should be therefore to give reasonable notice of the pleader's case to the opponent *and to the court*. This does not go so far as the technical notice pleading, since it requires notice of the pleader's entire cause, not merely that he has a claim. The notice to the court is perhaps the more important, for in general the opponent knows enough about the case to relieve us of worry about him. In fact we have spent altogether too much thought over the danger of surprising the defendant. * * * The main purpose of the pleadings should therefore be to give the trial court a proper understanding of the case.

It has been observed (Paul & Mertens The Law of Federal Income Taxation, Vol. 5, p. 160, note 11):

> Although Dean Clark's comments were directed to the necessity that pleadings give notice to trial courts, they are even more applicable to the Board of Tax Appeals because the Board—composed as it is of members well steeped in the technique of tax matters—is less apt to be "surprised" by a shift of position which may follow amended pleadings.

[10] Rule 18 reads as follows (Appendix E, *infra*, p. 69):

"The Board, upon motion of either party in which good cause is shown, or upon its own motion, may order a further and better statement of the nature of the claim or defense, or of any matter stated in any pleading. Such a motion filed by a party shall point out the defects complained of and the details desired. * * *"

to make more definite the Commissioner's statement of the nature of his defense. Instead, he was apparently content to argue that under no theory could the trust income be taxed to him. It is not necessary, however, to indulge in speculation on this score. The conclusive evidence has already been noted, namely, the action of the taxpayer in answering on its merits, without any claim of prejudice, the broad argument of the Commissioner that under Article 166–1, as amended, the taxpayer-settlor remained in substance the owner of the corpus (pp. 19–20, *supra*). Since the theory of substantial ownership under Article 166–1 as amended was properly raised and argued before the Board there would appear to be no need to ascertain whether the Board specifically passed upon it. The Board, in any event, nowhere states in terms that the theory was not raised and argued before it (R. 17).

3. It may be noted, at this point, that the Commissioner in his brief before the Board (Appendix A, *infra*, pp. 54–55) mentioned only Section 166 and did not specify Section 22 (a) as the statutory basis upon which is rested Article 166–1 of Regulations 86 as amended in 1936. But this fact, we submit, has no bearing on the scope of the question raised and presented to the Board by his reliance upon Article 166–1 as thus amended.

The amended article discloses on its face that it is not based solely upon Section 166 nor restricted to the types of trusts therein defined with particularity; it rests upon Section 22 (a) also. *Helvering* v. *Clif-*

ford, 309 U. S. 331, 334n. It likewise expresses the same theory as to tax liability adopted by this Court in the *Clifford* case. Thus the taxpayer was put squarely on notice that the theory of substantial ownership embodied in Article 166–1 as amended and in Section 22 (a) was asserted to be applicable and determinative in this case. Compare *Helvering* v. *Wood*, 309 U. S. 344, 349n; *Commissioner* v. *Berolzheimer*, decided December 23, 1940, 1941 C. C. H. par. 9156 (C. C. A. 2d).

The Commissioner never expressed any intention to narrow the question—framed by his reliance upon Article 166–1 as amended in 1936—whether this theory was applicable and determinative here. He insisted, at all times, that the theory that the grantor remains in substance the owner of the corpus was fully applicable in view of the essential nature of the trust. He also insisted that the amended regulations embodying this theory of taxability were reasonable and within his statutory authority. In support of the statutory validity of the amended regulations, which in fact rest on Section 22 (a), the Commissioner cited only Section 166. But he certainly did not waive or abandon Section 22 (a). Nor did he waive his contention that the theory embodied in the regulations was applicable to the trust under consideration. His sole omission before the Board, if it can be so termed, was merely the failure to specify the precise statutory provision on which the amended regulations were rested. This, we submit, in no way detracted from the force of his contention that the amended regulations and the theory therein expressed

were applicable to this case. Their presumptive validity as well as their terms—disclosing that they are not confined to Section 166—militate against any such disregard of the applicability here of the regulations and the theory of substantial ownership therein expressed.

4. In his petition for review in the Circuit Court of Appeals the Commissioner again urged that the income of the trust was attributable to the taxpayer-settlor under Article 166–1 of Regulations 86 as amended by Treasury Decision 4629 (1936) (R. 20, 23). Subsequently, however, as a result of the supervening decisions in *Helvering* v. *Clifford*, 309 U. S. 331, and *Helvering* v. *Wood*, 309 U. S. 344, the Commissioner in his "Statement of Points" sought to tax the trust income to the taxpayer-settlor under Section 22 (a) (R. 23). About the same time, in his brief, the Commissioner waived reliance upon Section 166 (Appendix C, *infra*, p. 59).

The question before this Court is whether the Commissioner, who had fully argued before the Board the applicability of the amended regulations and the theory of substantial ownership therein expressed, could on appeal advance Section 22 (a) in support of their validity under the Act. The sole reason for refusing him this opportunity, it appears, is that in urging the theory embodied in Article 166–1, as amended, which in fact rests upon Section 22 (a), the Commissioner did not in his argument expressly refer to this precise statutory tag. The question may conveniently be discussed under two headings: (a) whether the Commissioner could support the

validity of Article 166–1 as amended under Section 22 (a); and (b) whether the Commissioner could support the validity of the theory of substantial ownership under Section 22 (a).

(a) Article 166–1 of Regulations 86 as amended by Treasury Decision 4629 (1936) was, unless invalid, fully applicable to the tax year in question. Regulations 86 govern income tax liability under the Revenue Act of 1934 covering the tax years 1934 and 1935. The year 1936 and subsequent years are governed by the Revehue Act of 1936 and later Acts. The 1936 amendment to Regulations 86 therefore would have been entirely without meaning unless it were to apply to the years 1934 and 1935, the only years covered by the 1934 Act. The scheme of the revenue acts, moreover, contemplates that changes in regulations are to relate to all tax years governed by the regulations unless the Secretary of the Treasury or the Commissioner affirmatively provides that the change shall have only prospective application. The relevant statutory provision (Appendix E, *infra*, p. 62) states that—

> The Secretary, or the Commissioner with the approval of the Secretary, may prescribe the extent, if any, to which any ruling, regulation, or Treasury Decision, relating to the internal revenue laws, shall be applied without retroactive effect. [Section 1108 (a) of the 1926 Act, as amended by Section 506 of the 1934 Act.]

The legislative history of this provision, which fully supports our contentions, is set forth at length in our brief for the respondent in *Guggenheim* v. *Rasquin*, No. 92, this Term, to which we respectfully refer the Court. Compare *Helvering* v. *Clifford*, 309 U. S. 331, 334n.

The 1936 amendment, moreover, cannot be thought invalid solely because of this retroactive application. It amended Article 166–1, it is true, so as to rest upon Section 22 (a) as well as Section 166. *Helvering* v. *Clifford*, 309 U. S. 331, 334n. But the criteria governing taxability remained essentially the same and no new rule of liability was created. Thus the amendment merely sharpened the legal theory already incorporated in the article and rested the article upon two sections of the 1934 Act instead of one. See *Morrissey* v. *Commissioner*, 296 U. S. 344. The case of *Helvering* v. *Reynolds Tobacco Co.*, 306 U. S. 110, is plainly distinguishable. The amended regulations there were were directly contrary to prior regulations that had been uniform for many years.

In view of *Helvering* v. *Clifford*, 309 U. S. 331, there would appear to be no other reason for not sustaining the amended regulations. The criteria stated to be controlling in the *Clifford* case (309 U. S. at 335–337) do not differ in any material respect from the governing criteria described in Article 166–1 as amended. It therefore follows that the amended as well as the original regulations are well within the

area of discretion conferred by Congress on the Commissioner.

A word may be added here with respect to *Helvering* v. *Wood*, 309 U. S. 344. There the Commissioner before the Circuit Court of Appeals failed to mention the amended regulations in his assignments of error (Record in this Court in No. 384, October Term, 1939, pp. 17–18) and in his brief expressly waived reliance upon any section other than Section 166 (309 U. S. at 348–349). By so doing, of course, he waived reliance upon the only provision of the Act—Section 22 (a)—that could support the theory that the grantor who, even without a power to revoke, retains sufficient incidents of ownership should be regarded as owner in substance or that could support the amended regulations insofar as they embody the same theory (309 U. S. 344, 346–348). This Court observed (309 U. S. at 348–349):

> The Board of Tax Appeals purported to place its decision solely on § 166 and § 167 of the Act. Petitioner in his assignments of error specifically mentioned only § 166 and § 167, not § 22 (a). In his brief before the Circuit Court of Appeals petitioner expressly waived reliance upon any section other than § 166. * * * In view of these facts, especially the express waiver below, we do not think that petitioner should be allowed to add here for the first time another string to his bow. * * *

The Commissioner in the *Wood* case thus narrowed the case in the Circuit Court of Appeals to the single

question [11] whether Section 166 was broad enough to support the theory of substantial ownership, apart from power to revoke, either as expressed in the *Clifford* case or as expressed in the amended regulations. The Circuit Court of Appeals answered that question, and no other, and this Court in the circumstances was not willing to overrule the court below when it had answered correctly the only question on which its opinion was sought.

The question as to scope of review in the *Wood* case, moreover, was not whether the Circuit Court of Appeals correctly decided the issues before it, for it had done so, but whether this Court would exercise its discretionary jurisdiction in favor of a litigant who had abandoned the only ground for a decision in his favor. The citation of *Burnet* v. *Commonwealth Improvement Co.*, 287 U. S. 415, 418, lends support to the view that the *Wood* case was intended to state the correct practice under such circumstances in this Court, not the practice in the circuit courts of appeals. The reliance placed in the *Wood* opinion upon the express waiver in the court below is also an indication that the Commissioner in the absence of such waiver would have been allowed to urge Section 22 (a) in that court as well as in this Court. Each of these factors, as well as the com-

[11] The Commissioner's brief before the Circuit Court of Appeals stated (p. 5):

"* * * the Commissioner bases this appeal solely on the question whether or not such income is taxable under Section 166 of the 1934 Act."

bination, serves to distinguish the *Wood* case from the case at bar.

In this case the Commissioner had not, as he had done in the *Wood* case, expressly waived Section 22 (a) upon which amended Article 166–1 rests. And this Court is not being asked to exercise its discretionary jurisdiction to consider and find applicable a theory of taxability that the tribunal below was misled into believing was abandoned except insofar as it was supported by Section 166. Here, in contrast, the applicability of the theory of substantial ownership as expressed in Article 166–1 as amended and in Section 22 (a) to the transaction of trust under scrutiny was in fact raised and urged at every step by the Commissioner, before the Board (pp. 16–27, *supra*).

The Government's position here is supported by several considerations:

The taxpayer, in the first place, cannot reasonably contend that the Commissioner's reliance upon Section 22 (a) in the Circuit Court of Appeals in any way surprised or prejudiced him. The applicability of Section 22 (a)—that is the theory implicit in Section 22 (a)—to the facts of this case had been fully raised and argued before the Board (pp. 16–27, *supra*). The taxpayer had ample opportunity there to meet that point, and, if possible, show on the stipulated facts or on others that might have been adduced that the trust transaction did not fall within the criteria which the Commissioner asserted were applicable.

The only point not presented in complete detail by the Commissioner before the Board was the precise section of the Act that as a matter of law supported the theory of taxability embodied in the regulations asserted to be applicable. It might well be contended that, since the regulations are presumptively valid, the burden was on the taxpayer to show that the theory expressed in Article 166–1 as amended could not possibly be supported under any section of the Act, including Section 22 (a) upon which it rests. Surely, we submit, the Commissioner does not have the burden of sustaining the validity of the regulations in the first instance. But, in any case, the point of law raised by the Commissioner's reliance upon Section 22 (a) could be met just as adequately in the Circuit Court of Appeals as before the Board.

The taxpayer, of course, may contend that in the Board the facts bearing upon the applicability of the theory there urged by the Commissioner were not adequately developed. The Government doubts that any facts can be brought forward that could possibly aid the taxpayer's cause (pp. 47–48, *infra*). The Commissioner, moreover, can scarcely be held responsible for the failure of the taxpayer to produce the facts to meet the theory of substantial ownership raised and argued before the Board. The Government is not attempting to gain an undue advantage. It seeks merely the right to support the validity as a matter of law of the amended regulations and the

theory they embody against what the *Clifford* case shows is an erroneous attack (pp. 29–30, *supra*).

The propriety of urging on appeal new reasons to support the validity of a theory of taxability argued in the Board is well established. This case is well within the rule applied in *Helvering* v. *Gregory*, 69 F. (2d) 809 (C. C. A. 2d), affirmed, 293 U. S. 465. There the Commissioner had contended before the Board that the transfers in question were inoperative and that the transaction as a whole constituted merely a dividend declaration. The Board found that the transfers were real and expunged the deficiency. The Second Circuit agreed with the Board that real transfers of title had actually taken place but concluded that the transaction as a whole lacked business purpose and, therefore, was outside the scope of the Act. Here, too, the Commissioner contended that the transfer in trust was inoperative for tax purposes since the grantor retained substantial incidents of ownership. The *Gregory* case would appear to be clear authority that on appeal the Commissioner could point to Section 22 (a) as the correct statutory basis for his contentions. Here, it may be observed, the Commissioner is not even shifting his theory in any way but is merely adding a reason for sustaining its validity. Accord: *Seufert Bros. Co.* v. *Lucas*, 44 F. (2d) 528, 530 (C. C. A. 9th).

An analogous case is *Helvering* v. *Leonard*, 310 U. S. 80, 83. The Government there sought in the

Circuit Court of Appeals to hold taxable the grantor of an alimony trust under Section 22 (a) of the applicable revenue act. It urged that Section 22 (a) was applicable for two reasons: one, that the continuing obligation of the grantor was unnecessary for taxability, and two, that in any event the applicable New York law relating to the modification of alimony decrees supplied the continuing obligation if one were necessary. The Circuit Court of Appeals ruled against the Government on both grounds. 105 F. (2d) 900. Upon certiorari, the Government renewed both grounds and added a third, not theretofore mentioned in the litigation, namely, that the grantor's guaranty of bonds, which constituted a substantial portion of the corpus, furnished the continuing obligation. This Court permitted the Government to make the new contention, and actually decided it in the Government's favor, recognizing at the same time that it had not been considered by the court below. 310 U. S. at 83. The case, at the very least, shows that this Court permitted an additional reason to be advanced in support of a theory of taxability, namely, existence of a continuing obligation. The rule thus applied would clearly permit Section 22 (a) to be advanced here in support of the theory of substantial ownership embodied in Article 166–1 as amended which was fully argued before the Board, especially since the amended article in fact rests upon Section 22 (a). *Helvering* v. *Clifford*, 309 U. S. 331, 334n.

The *Leonard* case may well stand for the even broader proposition that even a new theory may be advanced on appeal where the facts have been adequately developed. Accord: *Seufert Bros. Co.* v. *Lucas*, 44 F. (2d) 528, 530 (C. C. A. 9th); *United States* v. *Spaulding*, decided October 21, 1940 (C. C. A. 5th); see *White* v. *Higgins*, decided December 12, 1940 (C. C. A. 1st).

Likewise, the discussion in *Commissioner* v. *Berolzheimer*, December 23, 1940 (C. C. A. 2d), supports the contention that Section 22 (a) could be urged on appeal here. There, as in the case at bar, the Commissioner advanced before the Board the theory of substantial ownership without specific mention of Section 22 (a) but with reliance in part upon Section 166. In a well-reasoned opinion the court ruled:

> It is argued that the government cannot raise before this court the question of the applicability of Sec. 22 (a) because it did not raise that point before the Board of Tax Appeals. This contention is plainly unsound. While it is true that at the hearings before the Board the government relied partly on Sec. 166, which relates to taxation of income from revocable trusts, it also contended that the provisions of each trust instrument gave the grantor such control over the corpus of the trust that "in reality there was no trust." * * * The government is doing no more here than giving new reasons why the income of the trusts is taxable against the settlors under Section 22 (a). * * *

The Government also respectfully directs the Court's attention to the authorities and reasoning relied upon in Point II, *infra*, pp. 16–38. They show that the Circuit Court of Appeals in this case should have considered even a new theory of taxability under the circumstances. It follows that the actual case at bar—in which the Commissioner is merely advancing a new reason in support of a theory of tax liability fully argued before the Board—is well within the argument urged under Point II.

It is not entirely clear from the terms of the writ whether this Court will pass upon the question whether the Circuit Court of Appeals should have considered the applicability of Article 166–1 as amended in 1936 and its validity under Section 22 (a). But, if it is open, then we submit that the amended regulations should have been so considered.

(b) It is likewise clear that the Circuit Court of Appeals should have considered the theory presented by Section 22 (a) as construed in *Helvering* v. *Clifford*, 309 U. S. 331. The amended regulations upon which the Commissioner specifically relied both before the Board and the Circuit Court of Appeals in fact rest in part upon Section 22 (a) (p. 27, *supra*). They also express the same theory as to tax liability which is expressed by Section 22 (a) as construed in the *Clifford* case (p. 29, *supra*). In these circumstances it would be anomalous to hold

that the theory implicit in Section 22 (a) was not properly before the Circuit Court of Appeals.

It may be noted in this connection that the retroactive features of the 1936 amendment have no relevance whatever with respect to the breadth of the question properly raised before the Circuit Court of Appeals. To state an extreme case, by way of example only, the 1936 amendment might be held invalid because retroactive but still the theory as phrased in the amended regulations would be properly raised. The Commissioner, whether justified or not, did place his reliance upon the amended regulations as governing the tax year in question. Compare *Helvering* v. *Wood*, 309 U. S. 344, 349n. By so doing, he framed a question as broad as that framed by Section 22 (a) and gave notice, to all who read the terms of the amended regulation, that the ultimate statutory basis for taxability was other than Section 166. The case of *Helvering* v. *Wood*, 309 U. S. 344, as we have indicated (pp. 30–32, *supra*), in no way militates against the force of our contentions.

It is therefore submitted that the decision of the court below was erroneous and should be reversed with directions to consider and dispose of the case under Section 22 (a) of the Revenue Act of 1934 and Article 166–1 of Regulations 86 as amended.

II

SECTION 22 (A) SHOULD HAVE BEEN CONSIDERED EVEN THOUGH THE THEORY OF SUBSTANTIAL OWNERSHIP WAS NOT RAISED BEFORE THE BOARD

The argument under this point assumes, contrary to our understanding of the facts (pp. 16–27, *supra*), that the theory of substantial ownership of the trust corpus was not raised or argued before the Board. The assumption will be indulged that "The issue presented to the Board was whether section 166 applied to a trust in which the estate reverted to the settlor after a period of years" and that "The stipulated facts were framed with this issue in view" (R. 29). Even in that posture, we submit, the case should have been considered and disposition made under Section 22 (a). Our contention may be viewed as posing two distinct questions, first, whether the court below had power to dispose of the case under Section 22 (a), and if so, whether directions should be given to exercise that power under the circumstances here disclosed.

1. (a) At the outset the Court's attention is respectfully directed to the group of cases applying the oft-repeated rule that an appellee may support the judgment under review by reliance upon any ground consistent with the record. *Langnes* v. *Green*, 282 U. S. 531; *Helvering* v. *Gowran*, 302 U. S. 238, 245–246, and cases therein cited. It is settled that the rule is applicable to the review of decisions of the Board of Tax Appeals. *Helvering* v. *Gowran*, 302

U. S. 238, 246; *Helvering* v. *Rankin*, 295 U. S. 123, 132–133. As Mr. Justice Brandeis stated for the Court in the *Gowran* case (302 U. S. at 246):

> The taxpayer sought review of the Board's decision by the Court of Appeals. The ultimate question before that court was whether, upon the facts stipulated, the Board had erred in affirming the Commissioner's determination that the additional taxes were due. If the Commissioner was right in his determination, the Board properly affirmed it, even if the reasons which he had assigned were wrong. And, likewise, if the Commissioner's determination was right, the Board's affirmance of it should have been sustained by the Court of Appeals, even if the Board gave a wrong reason for its action.

It should be noted that, in the *Gowran* case, the Commissioner was permitted to rely upon an issue never before raised even though the taxpayer apparently had not established before the Board all the facts that could affect the result. The taxpayer was therefore granted leave to apply to the Circuit Court of Appeals for that purpose. 302 U. S. at 247.

If the Commissioner as of right may raise an entirely new issue upon appeal to sustain the Board, even though the case must be remanded, one may doubt the existence of any blanket rule denying the circuit courts of appeals power ever to consider a new theory advanced by the Commissioner when, perchance, the Board decision is against him.

(b) The decisions show that this Court has no want of power to reverse a judgment under review upon a theory not theretofore presented. A recent example in the tax field is found in *Helvering* v. *Leonard*, 310 U. S. 80, 83. Accord: *Seufert Bros. Co.* v. *Lucas*, 44 F. (2d) 528, 530 (C. C. A. 9th). Another situation in which this Court will consider or order considered a new issue or theory not theretofore argued is illustrated by *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64; and *Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202.[12] During this Term the Court has asserted its power to consider errors of a fundamental nature whether raised or not. (*Sibbach* v. *Wilson & Company, Inc.*, No. 28, this Term, and cases cited. And the rule has been laid down that a supervening change in law or fact is substantial ground for reversing a judgment right when made. See cases cited, *infra*, pp. 50–52.

A somewhat analogous practice may be found in the settled rule that this Court, without finally disposing of a case, has power to remand the case for further proceedings where the trial was had upon the wrong theory or the record does not permit of final disposition with justice to all parties concerned. In cases arising from the inferior federal courts the power to vacate the judgment and remand for further proceedings has been exercised with liberality in a wide variety of situations. E. g., *United States* v. *Shelby*

[12] See also *New York Life Ins. Co.* v. *Jackson*, 304 U. S. 261; *Rosenthal* v. *New York Life Ins. Co.*, 304 U. S. 263.

Iron Co., 273 U. S. 571, 579; *United States* v. *Rio Grande Dam Co.*, 184 U. S. 416, 423; 215 U. S. 266, 275; *New York Central & H. R. Co.* v. *Beaham*, 242 U. S. 148, 152; *Jones* v. *Meahan*, 175 U. S. 1, 29; *Wiggins Ferry Co.* v. *Ohio & Miss. R. Co.*, 142 U. S 396, 413; *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 447; *Combs* v. *Hodge*, 21 How. 397, 408; *Crocket* v. *Lee*, 7 Wheat. 522, 527; *Watts* v. *Waddle*, 6 Pet. 389, 402.

(c) This Court, moreover, has never laid down any blanket rule prohibiting a circuit court of appeals from considering any issue except one fully argued before the Board. The case of *General Utilities Co.* v. *Helvering*, 296 U. S. 200, stands for no such proposition. The opinion in that very case referred to the merits of the new issue not argued before the Board (295 U. S. 207). Accord: *Helvering* v. *Salvage*, 297 U. S. 106, 109. The reason for thus considering the new issue is stated in the opinion (296 U. S. at 207): "To remand the cause for further findings would be futile. The Board could not properly find anything which would assist the Commissioner's cause." The inference from the language is plain. The judgment should be reversed and the case remanded to the Board for consideration of the new issue unless the record shows that the Commissioner cannot prevail on the correct rule of law as applied either to the existing findings or to such as might be made. Section 1141 (c), Internal Revenue Code, Appendix E, *infra*, p. 65. *Legg's Estate* v. *Commissioner*, 114 F. (2d) 760, 767 (C. C. A. 4th), and

cases therein cited. Compare *White* v. *Higgins*, decided December 12, 1940, C. C. H. par. 9136 (C. C. A. 1st).

The power to reverse the Board upon a new issue, with or without such a remand, is fully supported by the statutory provision governing review of Board cases by the circuit courts of appeals. The statute reads (Section 1141 (c), Internal Revenue Code, *infra*, p. 65):

> Upon such review, such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, *with or without remanding the case for a rehearing*, as justice may require. [Italics supplied.]

This affirmative command to dispose of the case "as justice may require" should not be ignored in determining the appropriate disposition upon appellate review of the Board's action. *Helvering* v. *Taylor*, 293 U. S. 507, 515–516; *Legg's Estate* v. *Commissioner*, 114 F. (2d) 760, 767 (C. C. A. 4th).

(d) The existence of the power to reverse a decision of the Board upon an issue or theory not there argued has been affirmed on many occasions. One of the most forceful statements in support of the validity of this practice is found in a recent opinion by Judge Parker (*Legg's Estate* v. *Commissioner*, 114 F. (2d) 760, 767 (C. C. A. 4th)). He there observed:

> We are given power by statute, 26 U. S. C. A. Int. Rev. Code § 1141 (c), "to affirm

> or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require." This is a broad power; and, if we are of opinion that the decision of the Board is not in accordance with law, we see no reason why we may not reverse its decision as justice may require, even on a point not raised before it. Just as we are emerging from the technicalities that formerly beset practice in courts of law and equity, it would be most unfortunate if we should develop a new system of technicalities to thwart and hamper the administration of justice in the ever increasing number of cases which come to us from administrative boards. * * *

His remarks find marked justification in the variety of occasions on which this asserted power has been exercised for the purpose of doing justice and equity in the inferior federal courts. E. g., *Seufert Bros.* v. *Lucas*, 44 F. (2d) 528 (C. C. A. 9th); *Chatham-Phenix Nat. Bank* v. *Helvering*, 87 F. (2d) 547, 550 (App. D. C.); *Edwards* v. *Holland Banking Co.*, 75 F. (2d) 713, 715 (C. C. A. 8th); *Hamilton Gas Co.* v. *Watters*, 75 F. (2d) 176, 182 (C. C. A. 4th); *Roosevelt* v. *Mo. State Life Ins. Co.*, 70 F. (2d) 939, 944 (C. C. A. 8th); *Eau Claire Book & Stationery Co.* v. *Commissioner*, 65 F. (2d) 125, 126 (C. C. A. 7th); *Underwood* v. *Commissioner*, 56 F. (2d) 67 (C. C. A. 4th); *Virginia-Lincoln Furniture Corp.* v. *Commissioner*, 56 F. (2d) 1028 (C. C. A. 4th).

It may be emphasized, once again, that the question here is not whether this Court in the exercise of its discretionary jurisdiction would, or should, consider an issue or a theory not fully argued before the lower courts. Cases in which this Court has chosen to ignore issues not raised in the petition for certiorari or argued here for the first time are completely beside the point. The question under consideration at this point is one of power, not discretion. The decisions holding that the circuit courts of appeals have that power are, we submit, fully supported by the analogous precedents in this Court and should be approved. It follows that the decision of the court below holding that, even if it wished, it lacked power to dispose of the case under Section 22 (a) (R. 29–30) was erroneous and should be reversed.

5. The question remains whether, assuming that it has the power, the Circuit Court of Appeals should be directed to make a disposition of this case under Section 22 (a). Whether or not a circuit court of appeals must always consider whatever theory is raised before it without regard to whether the theory was argued before the Board, nevertheless, in the case at bar the circumstances militate most strongly in favor of a disposition under Section 22 (a).

(a) The record shows beyond doubt that, whether or not it was affirmatively urged upon the Board (under Point I, *supra*, pp. 16–38, we contend it was), the theory of substantial ownership was never waived or abandoned by the Commissioner (R. 3–8, 20, 23). The Commissioner under established Board practice

would have been free under the pleadings to make the argument in the brief and have it considered by the Board (pp. 22–24, *supra*). It is equally clear that the Board itself could have raised the theory of substantial ownership and could have decided the case upon that theory.[13] The appeal to the Board is an appeal from a final determination of a deficiency. The duty of the Board essentially is to redetermine the correct tax liability of the taxpayer involved (pp. 21–22, *supra*).

The case at bar (viewed most favorably to the taxpayer) therefore discloses a situation in which a theory of liability—substantial ownership under Section 22 (a)—that might have been raised either by the Board or the parties, was overlooked and not directly called to the Board's attention. Since its disposition of the case, however, a supervening decision of this Court[14] has shown that this theory beyond doubt is applicable to the controversy and probably is determinative of the merits in favor of the Commissioner (pp. 47–48, *infra*). In future cases it is reasonable to assume the Board of its own motion will dispose of controversies like the present under Section 22 (a) (p. 20, *supra*). And the parties to such controversies, in any event, are not likely to overlook the theory spelled out in the

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[13] See *Helvering* v. *Gowran*, 302 U. S. 238, 246; *Minnesota Tea Co.* v. *Commissioner*, 76 F. (2d) 797 (C. C. A. 8th), aff'd, 296 U. S. 378; 34 B. T. A. 145, rev'd, 89 F. (2d) 711, aff'd, 302 U. S. 609; *Helvering* v. *Edison Securities Corp.*, 78 F. (2d) 85, 90–91 (C. C. A. 4th).

[14] *Helvering* v. *Clifford*, 309 U. S. 331.

Clifford case. The question here, then, in essence is this—whether some inflexible doctrine of appellate review militates against deciding the case at bar upon what appeal was only then clearly perceived to be the real merits of the controversy.

(b) In the case at bar, it is important to note, a disposition under Section 22 (a) may be made without the investigation of any transaction other than the transaction of trust under consideration by the Board. The stipulated facts in this case disclose all the terms of the instruments of trust (R. 11–16). These terms, we submit, are adequate to render the income chargeable to the taxpayer irrespective of what other evidence could be brought forward on his behalf. Such other evidence, whatever its character, could not possibly negative the fact that the corpus of the trust for the benefit of taxpayer's wife will be returned to him free of the trust within a period of five years. The grantor of a trust for so short a period in favor of a member of his family must be regarded as remaining in substance the owner of the corpus. Article 166–1 as amended by Treasury Decision 4629 (1936); *Helvering* v. *Clifford*, 309 U. S. 331. The fact, if it be a fact, that the wife had substantial income from other sources; that no restriction was placed on her use of the trust income; that such income was placed in her personal account and used for her private purposes; and that the trust was not designed or used to relieve the taxpayer from household expenses—this is all immaterial here. The contrary might well furnish additional reasons for

holding the taxpayer chargeable with the trust income. But absence of these other strings in no way detracts from the control exercised by the taxpayer through his power within five years to receive back the corpus, *Helvering* v. *Clifford*, 309 U. S. 331, at 333; Article 166–1 as amended by Treasury Decision 4629 (1936).

It follows that this case falls within the decisions holding that an appellate court should apply the correct rule of law wherever the facts have been adequately developed. E. g., *Helvering* v. *Leonard*, 310 U. S. 80, 83; *Seufert Bros. Co.* v. *Lucas*, 44 F. (2d) 528 (C. C. A. 9th); *White* v. *Higgins*, decided December 12, 1940, 1941, C. C. H., par. 9136 (C. C. A. 1st); *United States* v. *Spaulding*, decided October 21, 1940 (C. C. A. 5th).

The leading authority as to the correct practice to be followed by the circuit courts of appeals—the *General Utilities* case—does not militate against our position. By referring to the merits of the new issue, the opinion indicates that, even in the situation there disclosed, the Commissioner may have the proceeding remanded to the Board in the event his position is meritorious (p. 42, *supra*). Accord: *Helvering* v. *Salvage*, 297 U. S. 106, at 109. The *Clifford* case shows that our position here is meritorious.

The *General Utilities* case, in any event, is plainly distinguishable. The issue there sought to be raised for the first time upon appeal required an investigation of a transaction distinct from the transaction relevant to the issue argued before the Board and

urged in the petition for review. The argument to the Board was that taxable gain was realized by a corporation upon the distribution of appreciated assets to its stockholders (296 U. S. 200, 202–204). The new issue urged for the first time in the brief upon appeal was whether a sale of the appreciated assets by the stockholders, following the distribution, was carried through as agent for the corporation (296 U. S. at 204–205). Thus the sale by the stockholders which all parties before the Board viewed as a separate, unconnected transaction was sought to be brought into the controversy upon the appeal to the circuit court of appeals. In order to sustain the Commissioner upon the new issue the circuit court of appeals was compelled to make "an inference of fact directly in conflict with the stipulation of the parties and the findings" (296 U. S. at 206–207). Compare *Helvering* v. *Salvage*, 297 U. S. 106. No such conflict in facts or investigation of another transaction would result from a disposition of this case under Section 22 (a).

(c) Finally, we submit, the instances in which this Court has ordered that disposition of a case be made in the light of a supervening decision are clear warrant for directing the Circuit Court of Appeals to do the same here. The action of the parties and the Board indicate that, in a real sense, the precise theory of liability and its statutory basis as spelled out in the *Clifford* case was not well understood or well established—even though it was incorporated in the amended regulations—at the time this case was

argued before the Board (pp. 45–47, *supra*). The situation here may well be compared with the following:

(1) *Blair* v. *Commissioner*, 300 U. S. 5, arose upon this state of facts. A circuit court of appeals held that the taxpayer was chargeable with the income of a trust since under the law of Illinois the trust was a spendthrift trust and the assignments of income were invalid. *Commissioner* v. *Blair*, 60 F. (2d) 340. This Court denied certiorari. 288 U. S. 602. Subsequently, the State courts decided that the trust was not a spendthrift trust and upheld the assignments. *Blair* v. *Linn*, 274 Ill. App. 23. This Court recognized that ordinarily the prior decision as to taxability would be *res judicata* but that, since the local law was material to the controversy, the supervening State decision created a changed situation. It therefore considered the case on the merits. 300 U. S. at 8–9. The issue whether the assignments were valid, it may be noted, had been fully tried out in all the federal courts open to the taxpayer. Yet, several years later, the same issue was permitted to be retried in the federal courts. Suppose that, in the case at bar, the Government had failed to contest the Board decision and had merely assessed a deficiency for the following year. Under the *Blair* decision, we submit, there scarcely can be any doubt that the Commissioner could sustain such deficiency before the Board by reliance upon Section 22 (a) as construed in the supervening *Clifford* case. If *Blair* is authority for such an exception to the doctrine of *res judicata*, as it is, then surely it is

authority for our reliance upon *Clifford* when, as here, that supervening decision was issued during the process of litigation. This Court recently stated the controlling rule in *Vandenbark* v. *The Owens-Illinois Glass Co.*, No. 141, this Term:

> While not insensible to possible complications, we are of the view that, until such time as a case is no longer *sub judice*, the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decision of the highest state court.

We submit that sound analysis, as well as the decisions relied upon in the quoted opinion, leads to the conclusion that inferior federal courts are under a duty to apply the law in accordance with the then controlling decisions of this Court. See *Trapp* v. *Metropolitan Life Ins. Co.*, 70 F. (2d) 976, (C. C. A. 8th), affirmed on rehearing, 72 F. (2d) 374, certiorari denied, 293 U. S. 596.

(2) Numerous cases are set out in the margin [15] in which disposition was made in the light of a supervening decision material to the real merits of the

[15] *Gulf Colorado & S. F. Ry. Co.* v. *Dennis*, 224 U. S. 503; *Dorchy* v. *Kansas*, 264 U. S. 286; *Patterson* v. *Alabama*, 294 U. S. 600; *Trapp* v. *Metropolitan Life Insurance Co.*, 70 F. (2d) 976 (C. C. A. 8th), affirmed on rehearing, 72 F. (2d) 374, certiorari denied, 293 U. S. 596; *Sioux County* v. *National Surety Co.*, 276 U. S. 238; *Oklahoma Packing Co.* v. *Oklahoma Gas Co.*, 309 U. S. 4, 8; *Moores* v. *National Bank*, 104 U. S. 625.

controversy. A supervening statute [16] or treaty [17] or change in material facts [18] likewise has been the occasion for causing the reversal of a judgment, even one right when made. It would seem that, under these precedents, a judgment based upon an erroneous rule of law—where, as here, the correct rule of law was neither well understood nor well established—could surely be corrected upon appeal when a supervening decision of this Court has made the error so plain that all can see. The statutory provision that the circuit courts of appeals shall have power "if the decision of the Board is not in accordance with law" to dispose of the case "as justice may require" is a broad grant of authority that should not be exercised with a grudging hand.

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[16] *Missouri ex rel. Wabash Ry. Co.* v. *Public Service Commission*, 273 U. S. 126; *Dinsmore* v. *Southern Express Co.*, 183 U. S. 115; *Carpenter* v. *Wabash Railway Co.*, 309 U. S. 23.

[17] *United States* v. *Schooner Peggy*, 1 Cranch 103.

[18] *Duke Power Co.* v. *Greenwood County*, 299 U. S. 259; *Watts, Watts & Co.* v. *Unione Austriaca*, 248 U. S. 9, 21.

CONCLUSION

It is submitted that, for the reasons stated, the decision of the court below should be reversed with directions to dispose of the case under Section 22 (a) of the Revenue Act of 1934.

Respectfully,

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APPENDIX A

Excerpt from Government's Board brief in this case (p. 18):

III

The provisions of Article 166–1 of Regulations 86, as amended, require that the income of the present trust be taxed to petitioner.

The facts of the instant case bring them squarely within the scope of Article 166–1 of Regulations 86, as amended by Treasury Decision 4629, *supra*, and specifically that part of the regulations which provides as follows:

"But the provisions of section 166 are not to be regarded as excluding from taxation to the grantor the income of other trusts, not specified therein, in which the grantor is, for the purposes of the Act, similarly regarded as remaining in substance the owner of the corpus. The grantor is regarded as in substance the owner of the corpus if, in view of the essential nature and purpose of the trust, it is apparent that the grantor has failed to part permanently and definitively with the substantial incidents of ownership in the corpus."

It is apparent from the nature of the trust that petitioner has failed to part permanently and definitively with the substantial incidents of ownership in the corpus of the trust. Petitioner merely provided that the income of the trust for a limited number of years should be paid to his wife unless he died before the expiration of the limited number of years or unless she died before such expiration. He provided that during all of this limited time

the corpus of the trust should be kept intact for return to him upon the happening of any one of the events which should terminate the trust.

Respondent contends that the regulations are reasonable and fairly represent the intended application of the provisions of Section 166 of the Revenue Act of 1934 and that the application of the regulations to the facts of the instant case clearly requires that the Commissioner's determination of deficiency for the year 1934 should be sustained.

APPENDIX B

Excerpts from the taxpayer's reply brief before the Board in this case:

> The petitioner in his principal brief argued that the income arising under the trust during the year 1934 was not taxable to the grantor for the reasons (among others): First, that the existence of a reversionary interest after the termination of the trust for years does not constitute a power to revest within the meaning of Section 166 of the Revenue Act of 1934; second, that the event of the revesting of the corpus upon the death of the grantor or the death of the beneficiary during the life of the trust does not constitute a power to revest in the grantor; and, third, that since the power to revest in the grantor was in conjunction only with the beneficiary of the income of the trust, who had a substantial adverse interest, the income arising under the trust was not taxable to the grantor. The respondent in its brief appears to have admitted all of these propositions and to have cast the decision of this case upon the determination of the issue of the taxability of income arising under a trust to the grantor, regardless of any other circumstances, if the trust is a trust for a definite term of years with the corpus thereof reverting to the grantor at the termination thereof. From the brief for respondent it is clear that (except for the ultimate issue of taxability to the grantor of the trust income) every issue presented in the petitioner's brief is admitted, including the fact that the bene-

ficiary of the income here, the grantor's wife, had a substantial adverse interest.

* * * * *

It is to be noted that, in the Commissioner's deficiency letter (Petition, paragraph 2 and Exhibit A thereto), the position was taken that the trust involved "was a revocable trust and, therefore, the net income is taxable to the grantor.". The respondent seems to have definitely abandoned the position that this is a revocable trust, and now argues that in any trust for years where upon the termination thereof the corpus returns to the grantor the income arising therefrom during the intervening period is taxable to him. * * *

* * * * *

The next step, which is necessarily based upon the false premise just discussed, is that there was a regulation in effect in 1934 (part of Article 166–1, Regulations 86) providing that the grantor is regarded as in substance the owner of the corpus if it is apparent that he has failed to part permanently and definitively with the substantial incidents of ownership in the corpus, and that, the petitioner being in substance the owner of the corpus because it will ultimately come back to him, the income is taxable to him. The answer to this proposition is plain: The regulation as sought to be applied in this case goes beyond the pertinent statutory provision itself, and, seeking to make taxable what was expressly excluded from taxation by the statute itself, is null and void. We sincerely doubt if the regulation just referred to was adopted to be applied to a situation such as is presented herein. However, as we point out later herein, no life can be breathed into

a plainly invalid regulation by the subsequent re-enactment of the same statute.

* * * * *

As sought to be applied by the respondent in this case, Regulations 86 ignore completely the language of the Congress, whereby it provided for the taxability of the income arising under a trust where the grantor "had the power", and fail utterly, if the present interpretation thereof sought to be applied be correct, to distinguish between the "termination" of the trust by its own terms and the "revocation" of the trust by some unfettered act of the grantor before its automatic termination under express provisions of he trust instrument. * * *

* * * * *

APPENDIX C

Excerpt from Government's Circuit Court of Appeals brief in this case (p. 7):

> In view of the decision in the *Wood* case, we are not here contending that Section 166 is applicable to the instant case. But we do believe and submit that Section 22 may properly be considered on this appeal and that under the *Clifford* case the Commissioner is entitled to a reversal here. See also *Helvering* v. *Hormel* (C. C. A. 8th), decided April 25, 1940, not yet officially reported but found in Vol. 4, Prentice-Hall, 1940, par. 62, 617.

APPENDIX D

Reporter's Minutes before Board of Tax Appeals:

HEARING AT WASHINGTON, D. C., ON THE 6TH DAY OF DECEMBER, 1938, AT 9:30 O'CLOCK A. M.

The above-entitled proceeding came on for hearing on this, the 6th day of December, 1938, before the HONORABLE EUGENE BLACK, Member of the United States Board of Tax Appeals, at Washington, D. C., pursuant to notice of hearing heretofore given; whereupon, the following proceedings were had, to wit:

APPEARANCE:

EDW. WOOLF, Esq., (HONORABLE J. P. WENCHEL, Chief Counsel, Bureau of Internal Revenue), appearing on behalf of the COMMISSIONER OF INTERNAL REVENUE, Respondent.

PROCEEDINGS

The CLERK. Docket No. 92208, O. G. Richter.

Mr. WOOLF. May it please Your Honor, Mr. Brewster appears for the respondent.

Mr. BREWSTER. If Your Honor please, we have agreed upon the facts in this case, and we have a stipulation covering the material facts.

The MEMBER. Then, suppose I hear you on the second call here in this room. You might want to make a statement about the issues.

Mr. BREWSTER. If Your Honor please, that is entirely satisfactory.

(Whereupon, the case was continued until the second call of the calendar.)

[The record contains no further reference to any "statement about the issues" at the hearing.]

APPENDIX E

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * * [U. S. C. Supp. V, Title 26, Sec. 22.]

SEC. 166. REVOCABLE TRUSTS.

Where at any time the power to revest in the grantor title to any part of the corpus of the trust is vested—

(1) in the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom, or

(2) in any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom,

then the income of such part of the trust shall be included in computing the net income of the grantor. [U. S. C. Supp. V, Title 26, Sec. 166.]

SEC. 506. RETROACTIVITY OF REGULATIONS, RULINGS, ETC.

Section 1108 (a) of the Revenue Act of 1926, as amended, is amended to read as follows:

"(a) The Secretary, or the Commissioner with the approval of the Secretary, may prescribe the extent, if any, to which any ruling, regulation, or Treasury Decision, relating to the internal revenue laws, shall be applied without retroactive effect." [U. S. C., Title 26, Sec. 1691.]

Internal Revenue Code:

SEC. 1141. COURTS OF REVIEW.

(a). *Jurisdiction.*—The Circuit Courts of Appeals and the United States Court of Appeals for the District of Columbia shall have exclusive jurisdiction to review the decisions of the Board, except as provided in section 239 of the Judicial Code, as amended, 43 Stat. 938 (U. S. C., Title 28, § 346); and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 240 of the Judicial Code, as amended, 43 Stat. 938 (U. S. C., Title 28, § 347).

* * * * *

(c) *Powers.*—

(1) *To affirm, modify, or reverse.*—Upon such review, such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require.

* * * * *

Section 907 of the Revenue Act of 1924 as amended by Section 601 of the Revenue Act of 1928, provides in part as follows (c. 352, 45 Stat. 872):

The proceedings of the Board and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Board may prescribe and in accordance with the rules of evidence applicable in courts of equity of the District of Columbia.

Treasury Regulations 86, promulgated under the Revenue Act of 1934:

ART. 22 (a)–1. *What included in gross income.*—Gross income includes in general compensation for personal and professional services, business income, profits from sales of and dealings in property, interest, rent, dividends, and gains, profits, and income derived from any source whatever, unless exempt from tax by law. (See sections 22 (b) and 116.) In general, income is the gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets. * * *

Art. 166–1 (as amended by T. D. 4629, XV–I Cum. Bull. 140, 141 (1936)). *Trusts, with respect to the corpus of which, the grantor is regarded as remaining in substance the owner.*—(*a*) If the grantor of a trust is regarded, within the meaning of the Act, as remaining in substance the owner of the corpus thereof, the income therefrom is not taxable in accordance with the provisions of sections 161, 162, and 163 but remains attributable and taxable to the grantor. This article deals with the taxation of such income. As used in this article, the term "corpus" means any part or the whole of the property, real or personal, constituting the subject matter of the trust.

(*b*) Section 166 defines with particularity instances in which the grantor is regarded as in substance the owner of the corpus by reason of the fact that he has retained power to revest the corpus in himself. * * *

* * * * *

But the provisions of section 166 are not to be regarded as excluding from taxation to the grantor the income of other trusts, not specified therein, in which the grantor is, for the purposes of the Act, similarly regarded as remaining in substance the owner of the corpus. The grantor is regarded as in substance the owner of the corpus, if, in view of the essential nature and purpose of the trust, it is apparent that the grantor has failed to part permanently and definitively with the substantial incidents of ownership in the corpus.

In determining whether the grantor is in substance the owner of the corpus, the Act has its own standard, which is a substantial one, dependent neither on the niceties of the particular conveyancing device used, nor on the technical description which the law of property gives to the estate or interest transferred to the trustees or beneficiaries of the trust. In that determination, among the material factors are: the fact that the corpus is to be returned to the grantor after a specific term; the fact that the corpus is or may be administered in the interest of the grantor; the fact that the anticipated income is being appropriated in advance for the customary expenditures of the grantor or those which he would ordinarily and naturally make; and any other circumstances bearing on the impermanence and indefiniteness with which the grantor has parted with the substantial incidents of ownership in the corpus.

Thus the grantor is regarded as being in substance the owner of the corpus if, in any case, the trust amounts to no more than an arrangement whereby the grantor, in the ordering of his affairs, finds it expedient to entrust for a period the title to, and custody or management of, certain of his property to a trustee, the income from such property to be used by the trustee during such period to make those expenditures which the grantor would customarily or ordinarily or naturally make and to which the grantor chooses to commit himself in advance, while the corpus is to be held intact, for return in due course to the grantor. In such a case, it is immaterial that, at the time of the creation of the trust, an irrevocable disposition or consummated gift was made of those property rights which consist of the right to the expected future income of the corpus for the specified period. On the other hand, if the grantor, incident to a definitive and permanent disposition of certain of his property, creates the trust in order to conserve the property, not for himself but for the donees, who will ultimately enjoy it, the provisions of sections 161, 162, and 163 are applicable.

(*c*) For example, a grantor is regarded as remaining in substance the owner of the corpus of the trust, if he has placed it in trust for his son, John.

(A) for the term of three years, at the end of which time the trust might be extended for a like period at the option of the grantor and successively thereafter, but in the absence of such an extension the title is once more to revest in the grantor in possession and enjoyment; * * *

Rules of Practice before the Board of Tax Appeals:

Rule 6.—Initiation of a Proceeding—Petition.

A proceeding shall be initiated by filing with the Board a petition, as provided in Rules 4, 5, and 8, and substantially in accordance with Form 2, shown in Appendix I. The petition shall be complete in itself so as fully to state the issues. It shall contain:

* * * * *

PETITION

(b) Proper allegations showing jurisdiction in the Board.

(c) A statement of the amount of the deficiency [or liability, as the case may be], determined by the Commissioner, the nature of the tax, the period for which determined, and the amount thereof (as nearly as may be computed) in controversy.

(d) Clear and concise assignments of each and every error which the petitioner alleges to have been committed by the Commissioner in the determination of the deficiency. Issues in respect of which the burden of proof is by statute placed upon the Commissioner will not be deemed to be raised by the petitioner in the absence of assignments of error in respect thereof. Each assignment of error shall be numbered.

(e) Clear and concise numbered statements of the facts upon which the petitioner relies as sustaining the assignments of error, except those assignments of error in respect of which the burden of proof is by statute placed upon the Commissioner.

(f) A prayer, setting forth relief sought by the petitioner.

(g) The signature of the petitioner or that of his counsel. (See Rule 4.)

* * * * *

(i) A copy of the notice of deficiency [or liability, as the case may be], shall be appended to the petition. If a statement has accompanied the notice of deficiency, so much thereof as is material to the issues set out in the assignments of error likewise shall be appended. If the notice of deficiency refers to prior notices from the Bureau, which are necessary to elucidate the determination, such parts thereof as are material to the issues set out in the assignments of error shall likewise be appended. (See Appendix I, Form No. 2.)

Rule 14.—Answer

After service upon him of a copy of the petition, the Commissioner shall have 60 days within which to file an answer or 45 days within which to move in respect of the petition. The answer shall be so drawn as fully and completely to advise the petititioner and the Board of the nature of the defense. It shall contain a specific admission or denial of each material allegation of fact contained in the petition and a statement of any facts upon which the Commissioner relies for defense or for affirmative relief or to sustain any issue raised in the petition in respect of which issue the burden of proof is, by statute, placed upon the Commissioner. Each paragraph contained in the answer shall be numbered to correspond with the paragraphs of the petition. An original and four copies of the answer shall be filed, of which the original shall be signed by the Commissioner or his counsel and the copies conformed by him.

The clerk will serve one copy of the answer upon the petitioner or his counsel of record by registered mail.

Rule 15.—Reply

If the answer of the Commissioner sets forth facts upon which he relies for affirmative relief, or contains a statement of the facts upon which he relies to sustain an issue in respect of which the burden of proof is placed upon him by statute, the petitioner shall, within 45 days after a copy of such answer is mailed to him or his counsel of record by registered mail, file a reply which shall contain a specific admission or denial of each material allegation of fact contained in the answer and shall set forth any facts upon which he relies for defense. Each paragraph contained in the reply shall be numbered to correspond with the paragraphs of the answer. An original and four copies of the reply shall be filed, of which the original shall be signed by the petitioner or his counsel and the copies conformed by him.

The Board upon motion of the respondent in which good cause is shown, or upon its own motion, may require the verification of any reply.

The clerk will serve one copy of the reply upon the Commissioner.

Rule 16.—Joinder of Issue

A proceeding shall be deemed at issue upon the filing of the answer unless a reply is required under Rule 15, in which event the proceeding shall be deemed at issue upon the filing of the reply.

Rule 17.—Amended and Supplemental Pleadings

The petitioner may, as of course, amend his petition at any time before answer is filed. After answer is filed, a petition may be

amended only by consent of the Commissioner or on leave of the Board.

All motions to amend, made prior to the hearing, must be accompanied by the proposed amendments or amended pleading.

Upon motion made, the Board may, in its discretion, at any time before the conclusion of the hearing, permit a party to a proceeding to amend the pleadings to conform to the proof.

When motions to amend are granted at the hearing, the amendment or amended pleading shall be filed at the hearing or with the Board within such time as the member presiding may fix.

See Rules 4 and 19.

Rule 18.—Pleadings—General

The Board, upon motion of either party in which good cause is shown, or upon its own motion, may order a further and better statement of the nature of the claim or defense, or of any matter stated in any pleading. Such a motion filed by a party shall point out the defects complained of and the details desired. * * *

* * * * * *

Rule 30.—Submission Without Hearing or Appearance

(*a*) *Submission of cases without hearing where facts are uncontested.*—Any case not requiring a hearing for the submission of evidence (as, for example, where sufficient facts have been admitted, stipulated, or included in the record in some other way) may be submitted at any time by notice of the parties filed with the Board. The parties need not wait for the proceeding to be cal-

endared and need not appear in person. The Chairman will then assign the proceeding to a Division for report, which division, upon request of the parties, will fix a time for filing briefs or for oral argument.

(*b*) A contested motion, not predicated upon an issue of fact, may be submitted in the same way.

See, however, Rule 31.

Rule 31.—Evidence and the Submission of Evidence

* * * * *

(*b*) *Stipulations.*—The parties by stipulation in writing filed with the Board or presented at the hearing, may agree upon any facts involved in a proceeding. A complete duplicate of the stipulation, including all exhibits, shall be filed at the same time. Stipulations filed need not be formally offered to be considered in evidence.

* * * * *

(*f*) *Failure of proof.*—Failure to adduce evidence in support of the material facts alleged in the petition and denied by the Commissioner in his answer will be ground for dismissal. Where there is a joinder of issue on questions of fact, the provisions of Rule 30 do not relieve the party upon whom rests the burden of proof from properly producing evidence to support the issues.

Rule 32.—Burden of Proof

The burden of proof shall be upon the petitioner, except as otherwise provided by statute and except that in respect of any new matter pleaded in the answer, it shall be upon the respondent.

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No. 516.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

v.

O. G. RICHTER, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

RICHARD H. WILMER,
DOUGLAS L. HATCH,
Attorneys for Respondent.

November 7, 1940.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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OPINION BELOW.

The opinion below of the United States Circuit Court of Appeals for the Third Circuit (R. 28-30) is reported in 114 F. (2d) 452. That court unanimously affirmed a decision of the United States Board of Tax Appeals (R. 17-18) which determined that there was no deficiency in income tax for the taxable year 1934. The Memorandum Opinion of the Board (R. 16-17) is not officially reported.

STATEMENT OF THE CASE.

The summarization of the facts contained in the petition substantially states all of the essential facts. There is one additional fact which was not presented, namely, that the beneficiary reported the income from the trust in her income tax return for the year 1934 (R. 10).

It is to be noted at the outset that before the Board the Commissioner based the alleged tax liability of the respondent exclusively upon the issue of the application of Section 166 of the Revenue Act of 1934. From the decision of the Board the Commissioner appealed to the court below. In assigning error (R. 20) in the decision of the Board, the Commissioner specifically assigned as error the determination of non-taxability under the provisions of Section 166 of the Revenue Act of 1934; not having yet raised the issue of taxability under Section 22(a) of the Revenue Act of 1934, he did not assign as error the failure of the Board to hold that the trust income was taxable to the settlor under the provisions of Section 22(a) of the Revenue Act of 1934. After the decision of this Court in the case of *Helvering* v. *Wood,* 309 U. S. 344, the preparation of the record by stipulation having been held in abeyance pending such decision, the Commissioner for the first time by his Statement of Points To Be Relied Upon (R. 22) sought to raise the issue of taxability under the provisions of Section 22(a) of the Revenue Act of 1934, and before the court below specifically abandoned the issue of taxability under Section 166.

In his petition for writ of certiorari, the Commissioner for the first time seeks to contend that the issue of taxability under Section 22(a) of the Revenue Act of 1934 was properly presented for determination by virtue of the reference by the Commissioner in Point III of his brief before the Board to the provisions of Article 166-1 of Regulations 86. Point III of such brief in no wise raised the issue of taxability under Section 22(a) and in fact the provisions of the Regulations were merely urged as an additional reason in support of taxability under Section 166 of the Revenue Act of 1934. After quoting from Article 166-1 of Regula-

tions 86, the Commissioner concluded Point III of his brief as follows:

> "Respondent contends that the regulations are reasonable *and fairly represent the intended application of the provisions of Section 166 of the Revenue Act of 1934* and that the application of the regulations to the facts of the instant case clearly requires that the Commissioner's determination of deficiency for the year 1934 should be sustained." (Italics ours.)

The case before the Board having been tried on the single issue of taxability under provisions of Section 166, and the Commissioner having abandoned such issue of taxability in the court below, that court merely held that it would not pass upon the new issue sought to be presented on appeal for the first time and affirmed the decision of the Board.

QUESTIONS PRESENTED.

The only question raised by the petition for writ of certiorari is whether the Circuit Court of Appeals erred in refusing to review the decision of the Board of Tax Appeals on the basis of an issue raised for the first time in that court, the sole issue, upon which the case had been originally tried and submitted before the Board, having been abandoned by the Commissioner.

STATUTES AND REGULATIONS INVOLVED.

The issue of tax liability under Section 166 of the Revenue Act of 1934, having been abandoned by the Commissioner, that Section of the Revenue Act is no longer directly involved. The Commissioner, we believe, erroneously seeks to make applicable the provisions of Section 22(a) of the Revenue Act of 1934, and the provisions of 166-1 of Treasury Regulations 166, as amended.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED.

The petition presents no genuine conflict of decisions, nor does it present an important question of general law.

ARGUMENT.

POINT I.

A Writ of Certiorari Should not be Granted to Review an Issue not Considered by, and not Properly Raised Before, the Board.

The issue of taxability under the provisions of Section 166 of the Revenue Act of 1934 having been abandoned by the Commissioner, the sole point remaining for decision by the court below was whether the Commissioner might, on appeal, successfully assert tax liability on a new issue presented for the first time in that court.

This Court has repeatedly refused to permit an issue, not framed and tried before the Board, to serve on appeal as a basis for predicating tax liability. See *Helvering* v. *Wood,* 309 U. S. 344, 60 S. Ct. 551, 553; *Helvering* v. *Tex-Penn Oil Co.,* 300 U. S. 481, 498; *Helvering* v. *Salvage,* 297 U. S. 106, 109; *General Utilities & Operating Co.* v. *Helvering,* 296 U. S. 200, 206; *Helvering* v. *Minnesota Tea Co.,* 296 U. S. 378, 380; *Burnet* v. *Commonwealth Improvement Co.,* 287 U. S. 415, 418.

The Commissioner, apparently recognizing the soundness of this line of authorities, now seeks in his petition herein to bring this case outside the purview of such authorities by asserting that the issue of taxability under Section 22(a) of the Revenue Act of 1934 was actually presented to the Board by virtue of the fact that before the Board the Commissioner relied upon Article 166-1 of Regulations 86. That such Regulations were promulgated under the provisions of Section 166 of the Revenue Act of 1934, is clear. The amended provisions of such Regulations were not put into effect until after the tax year in question. Furthermore, the issue of tax liability cannot be predicated on a mere Regulation, but must find basis in the Revenue Act itself. In *Helvering* v. *Wood, supra,* the Commissioner was not permitted, through the assertion of Article 166-1, to shift to Section 22(a) a case which had been tried under Section 166. In that case and in *Helvering* v. *Clifford,* 309 U. S. 331, this Court considered that Article 166-1 was not

an appropriate regulation on which tax liability under Section 22(a) might be asserted for the year 1934, which is the only year involved in the instant case. The issue presented and tried before the Board in the instant case was one solely of taxability under Section 166, and the issue of taxability under the provisions of Section 22(a) was not asserted by the Commissioner until after the decision of this Court in the case of *Helvering* v. *Wood, supra.* In that decision the Commissioner acquiesced by abandoning in the instant case the issue of taxability under Secton 166.

In the original deficiency letter (R. 7) the Commissioner fixed the issue of tax liability when he determined:

> "The record indicates that under the provisions of Section 166 of the Revenue Act of 1934 the trust created by you in 1930 for the benefit of your wife, Nanny C. Richter, was a revocable trust and, therefore, the net income is taxable to the grantor."

The issue so stated was the only issue upon which the parties tried the case before the Board. The Board so held, for in its decision it stated that the issue

> "for decision is whether the trust income is taxable to the petitioner under Section 166 of the Revenue Act of 1934." (R. 16)

The simple question now involved, therefore, is whether the taxpayer is to be subjected to the "possibility of prejudice" which to the court below appeared [redacted] "to be self evident."

As was noted by the court below in the instant case, the stipulation of facts and the preparation of the entire case were predicated upon the issue of tax liability under Section 166. The court, in considering the new issue of tax liability under Section 22(a) and the effect of passing upon such new issue on appeal for the first time, said, 114 F. (2d) 452, 453 (R. 29):

> "The issue presented to the Board was whether section 166 applied to a trust in which the estate reverted to the settlor after a period of years. The stipulated facts were framed with this issue in view. Under sec-

tion 22(a) the issue presented is whether the grantor after the establishment of the trust may still be treated as the owner of the corpus. This involves in addition to an analysis of the terms of the trust consideration of all of the circumstances attendant on its creation and operation. Helvering v. Clifford, supra. Obviously many facts which would be totally irrelevant to the issue which was presented to the Board might be pertinent and even determinative of the issue now sought to be raised for the first time in this court. The possibility of prejudice to the taxpayer appears to us to be self evident."

To the same effect is a statement by this Court, *General Utilities & Operating Co.* v. *Helvering, supra,* at page 206:

> "Always a taxpayer is entitled to know with fair certainty the basis of the claim against him. Stipulations concerning facts and any other evidence properly are accommodated to issues adequately raised."

See also the similar statement in *Helvering* v. *Tex-Penn Oil Co., supra,* at page 498.

POINT II.

Under the Limited Facts Presented to the Board, There is no Liability Under Section 22(a) of the Revenue Act of 1934.

Even on the basis of the facts as stipulated before the Board, limited as they were to the one narrow issue then present before the Board, the income from the trust involved here could not have been held to be properly taxable to the settlor, even if the issue of Section 22(a) had been raised in a proper fashion before the Board. The facts in the instant case are substantially different from those in the *Clifford* case. The Court in that case did not hold that under Section 22(a) the income from all short-term trusts made by husbands for the benefit of wives was taxable to the husbands. If Congress had intended such a result, it could easily have said so, but that it has never done. Without stating all the points of factual difference between the instant case and the *Clifford* case, it should be noted that in

the instant case The Union Trust Company of Pittsburgh was the trustee, not the settlor. Such trustee had power (a) to hold and invest the trust securities; (b) to convert and sell them and to reinvest the proceeds of such investments as it should deem safe and profitable; (c) to collect and receive interest, income, dividends and profits; and (d) to pay the expenses of the management of the trust fund and to pay the balance of said interest, income and profits to the beneficiary. In the *Clifford* case, this Court was careful to point out that each case under Section 22(a) rests on its own particular facts. Thus, on such limited facts that were stipulated in the instant case, it seems clear that the income from the trust would not have been taxable under Section 22(a), even if the issue had been properly raised when the case was before the Board.

POINT III.

There Exists no Genuine Conflict of Decisions.

The Court should not grant the petition for writ of certiorari on the basis of the alleged conflict between the decision in this case and the decision in *Helvering* v. *Hormel*, 111 F. (2d) 1. A decision by this Court of the *Hormel* case, in which the petition for writ of certiorari has already been granted, will set at rest any conflict that might exist between that case and the decisions of this Court above referred to holding that a new issue of tax liability cannot be asserted on appeal. The Circuit Court of Appeals in its decision in the *Hormel* case specifically held that in that "case there is no dispute about the facts;" indicating that the basic facts necessary for a determination of the new issue were before the court. All the facts on a Section 22(a) issue are not before this Court in the instant case, as the court below so found, and that is a fundamental distinction. The Circuit Court of Appeals in the *Hormel* case stated that its right to reverse the Board on the newly-raised issue of tax liability under Section 22(a) "is not free from doubt." The final resolution of this doubt by this Court is in no wise dependent upon the granting of certiorari in the instant case.

The existence of conflict between decisions of two or more circuit courts of appeals generally forms a basis for the granting of petitions for writs of certiorari by this Court. However, the present situation does not appear to us to come within this general rule, for the reason that the decision of the court below in the instant case follows a long line of authorities of this Court and Circuit Courts of Appeals,[1] and the only decision that may be considered contrary to this established line of decisions is the *Hormel* case itself, a separate decision standing all alone in which the court that rendered it admitted its action was "not free from doubt." From what has just been stated, it is submitted that there is not involved in this case an important question of general law, as that expression is generally understood.

CONCLUSION.

The decision below was right. The law is settled, and the decision could not have been otherwise, without disregarding a long line of decisions of this Court. In addition, there is nothing in the record on which the court below might have found respondent liable under Section 22(a), had it erroneously considered that issue.

The petition for writ of certiorari should be denied.

Respectfully submitted,

RICHARD H. WILMER,
DOUGLAS L. HATCH,
Attorneys for Respondent.

November 7, 1940.

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[1] *Rhodes* v. *Commissioner*, 111 F. (2d) 53 (C. C. A. 4th, 1940); *Kottemann* v. *Commissioner*, 81 F. (2d) 621 (C. C. A. 2d, 1936). See also *Helvering* v. *Achelis*, 112 F. (2d) 929 (C. C. A. 2d, 1940), in which the United States Circuit Court of Appeals for the Second Circuit on an appeal from a decision of the Board of Tax Appeals, holding the taxpayer nontaxable on the sole issue of taxability under Section 166, declined to consider the taxpayer's liability under the issue of the applicability of Section 22(a) raised for the first time in that court. No review of that decision has been sought in this Court and the time therefor has now expired.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 516.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *Petitioner*,

v.

O. G. RICHTER, *Respondent*.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR THE RESPONDENT.

RICHARD H. WILMER,
DOUGLAS L. HATCH,
Attorneys for Respondent.

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O. G. RICHTER, *Respondent.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR THE RESPONDENT.

OPINIONS BELOW.

The memorandum opinion of the United States Board of Tax Appeals (R. 16-17) is not officially reported. The opinion below of the United States Circuit Court of Appeals for the Third Circuit (R. 28-30), affirming the decision of the United States Board of Tax Appeals, is reported in 114 F. (2d) 452.

QUESTION PRESENTED.

This case was tried before the United States Board of Tax Appeals (hereinafter sometimes referred to as the Board) on the issue of tax liability under Section 166 of the Revenue Act of 1934.[1] From a decision in favor of the Respondent, the Commissioner appealed to the United States Circuit Court of Appeals for the Third Circuit (hereinafter sometimes referred to as the Circuit Court of Appeals) and thereafter asserted that the Respondent was liable for taxes under Section 22(a) of the Revenue Act of 1934.[2] The Court held that the Board had committed no error and that the Court could not review an issue which had never been presented to the Board (R. 28-30).

The writ of certiorari granted by this Court (R. 31) limits review of this case to the question "whether, by

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[1] Sec. 166. Revocable Trusts.

Where at any time the power to revest in the grantor title to any part of the corpus of the trust is vested—

(1) in the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom, or
(2) in any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom,

then the income of such part of the trust shall be included in computing the net income of the grantor. [U. S. C. Supp. V, Title 26, Sec. 166.]

[2] Sec. 22. Gross Income.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, . . . of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * * [U. S. C. Supp. V, Title 26, Sec. 22.]

invoking the general gross income provisions of Section 22, the Commissioner had so changed the theory of the Government's case on appeal as to preclude the Circuit Court of Appeals from considering the issue". (Petition for Writ of Certiorari herein, page 2.)

In the light of the Commissioner's brief, this question involves the further questions of whether the Respondent was advised with fair certainty before the Board that the Commissioner was asserting a claim against him of tax liability based upon the provisions contained in Section 22(a) and whether the appellate court should have considered the new issue of law and fact which was not raised in the trial tribunal.

STATUTES AND REGULATIONS INVOLVED.

Section 22(a) and Section 166 of the Revenue Act of 1934 have been set out in footnotes. Article 166-1 of Regulations 86, as amended by Treasury Decision 4629 (1936), appears in Appendix E to the Commissioner's Brief, pp. 63-65.

STATEMENT.

In December, 1930, the Respondent created a trust under which the net income was payable to the Respondent's wife. He designated as sole trustee The Union Trust Company of Pittsburgh, which held all entrusted securities in its own name. Under the trust instrument, the trustee alone had power to hold and invest the trust securities; to convert and sell them; to reinvest the proceeds as it should deem safe; to collect interest, income, dividends and profits; to pay the expenses of management, and to pay over the balance of such income to the beneficiary in such installments as she might request.

The trust was revocable only on notice by the Respondent together with the written consent of the beneficiary. The Respondent did not at any time have any agreement with his wife, nor had he ever asked his wife, to consent to a termination of the trust. By its terms the trust was to expire in January, 1936, but in 1932 the term was extended to January, 1938. Otherwise, the trust was to terminate upon the earlier death of the settlor or of the beneficiary.

The entire net income was paid by the trustee to the beneficiary from the date of the creation of the trust in 1930 to the termination thereof in November, 1935, when the beneficiary died. The beneficiary reported the income received from the trust in 1934 in her income tax return for that year (the only year here involved). On the basis of Section 166 of the Revenue Act of 1934, the Commissioner of Internal Revenue added the net income from the trust to the Respondent's reported net income and determined a deficiency in his tax for 1934. In a statement accompanying the notice of deficiency, the Commissioner explained the changes as follows:

> "The record indicates that under the provisions of section 166 of the Revenue Act of 1934, the trust created by you in 1930 for the benefit of your wife, Nannie C. Richter, was a revocable trust and, therefore, the income is taxable to the grantor" (R. 7).

The Respondent appealed to the Board, contending that he, as grantor, did not retain under the trust instrument power to revest the trust corpus within the meaning of Section 166. Before the Board, the Commissioner contended that the trust income was taxable to the grantor under Section 166 of the Revenue Act of 1934 and made reference to Article 166-1 of Regula-

tions 86, as amended, which, he said, "fairly represent the intended application of the provisions of Section 166 of the Revenue Act of 1934." The Board noted as follows:

> "The [Commissioner], in adding the trust income to [the grantor's] income for 1934, has proceeded on the theory that section 166 of the Revenue Act of 1934 makes the trust income taxable to the grantor of the trust" (R. 17).

In determining the sole issue before it, the Board held that the trust income was not taxable to the grantor for the year 1934.

The Commissioner sought review of the Board's decision by the Circuit Court of Appeals, assigning as error the failure of the Board to hold that the trust income was taxable to Respondent under Section 166 and Article 166-1 of Regulations 86, as amended in 1936 (R. 20). On motion of the Commissioner, agreed to by the Respondent herein, preparation of the record for review was held in abeyance pending the decision of this Court in the case of *Helvering* v. *Wood,* 309 U. S. 344, for the reason that "the issue involved in this case is similar to that presented in the [*Wood*] case". Following that decision, the Commissioner filed in the Circuit Court of Appeals a Statement of Points to be Relied Upon (R. 22-23) in which he alleged that the Board also erred in failing to hold the trust income taxable to the Respondent under Section 22(a) of the Revenue Act of 1934. This was clearly an afterthought and an attempt to bring in a new issue which had not been preserved by his assignments of error filed long before. Thereupon the Respondent objected to the inclusion in the record of this Statement of Points to be Relied Upon (R. 25). When the Commissioner, in his brief

before the Circuit Court of Appeals, subsequently abandoned Section 166 as a ground for the reversal of the Board's decision, the Respondent moved to strike the Statement of Points to be Relied Upon and moved to dismiss the appeal (R. 26-27). Although the Respondent thus opposed the manner in which the Commissioner sought to raise on appeal a new issue which had not been tried below, the Circuit Court of Appeals preferred to affirm the Board's decision on the ground, as Respondent also contended, that the Board had committed no error and that an appellate court could not consider an issue which had never been presented to the Board (R. 28-30).

SUMMARY OF ARGUMENT.

We shall contend:

(1) Contrary to what the Commissioner has endeavored to show from sources within and without the record, it is clear beyond any question that there is nothing in any of the proceedings in this case which affords any basis for the right of the Commissioner to assert on appeal the applicability of Section 22(a). This issue was not raised directly or indirectly before the Board or, to begin with, before the Circuit Court of Appeals. Any attempt on the part of the Commissioner to claim that such issue was present before the Board by virtue of reference in the proceedings there to Article 166-1, as amended, is not borne out by the facts, and furthermore, all reference to such Article for any purpose was abandoned before the Circuit Court of Appeals.

(2) Article 166-1, as amended in 1936, could not be the basis for the assertion of tax liability under Section 22(a). Any other result would be contrary to other portions of the same Regulations 86 which advises tax-

payers that each article is to be read as an interpretation of the corresponding section of the Act. Then, too, the Article amended in 1936 could not have any bearing on a tax liability asserted for the year 1934. *Helvering* v. *Wood*, 309 U. S. 344; *Helvering* v. *Clifford*, 309 U. S. 331. If such Article goes to the extent the Commissioner claims, it is invalid.

(3) The Circuit Court of Appeals, in refusing to consider the new issue first raised in that Court, followed the well defined law on the subject. *Helvering* v. *Wood*, 309 U. S. 344; *General Utilities & Operating Co.* v. *Helvering*, 296 U. S. 200.

POINT I.

None of the Proceedings in this Case Affords Any Basis for the Right of the Commissioner to Assert on Appeal the Applicability of Section 22(a).

Because of the many curious turns and twists which the Commissioner has given to this case since it began with the issuance of the ninety day letter (R. 4-7), he apparently found it necessary to have recourse, in an effort to find some basis for his contentions before this Court, to the briefs and various other documents outside of the record. Notwithstanding that, the proceedings in this case, whether within or without the record, disclose that the very first time that the Commissioner advanced a "substantial incidents of ownership" argument within the meaning of Section 22(a), or pursuant to what this Court said in *Helvering* v. *Clifford*, 309 U. S. 331, was after his appeal had been taken to the Circuit Court of Appeals. Likewise, it is equally clear that the first time that the Commissioner relied upon Article 166-1, as amended, of Regulations 86 as an independent basis for raising an issue under Section

22(a) was in his petition to this Court for writ of certiorari. To outline these various steps in the pending litigation, the Respondent also must now refer to documents outside of the record.

At the outset of the present tax dispute, the Commissioner in a ninety day letter asserted a tax deficiency on the basis of Section 166, as follows:

> "The record indicates that under the provisions of section 166 of the Revenue Act of 1934 the trust created by you in 1930 for the benefit of your wife, Nannie C. Richter, was a revocable trust and, therefore, the net income is taxable to the grantor. In accordance with the provisions of the trust instrument, the trust could be terminated by you at any time with consent of the beneficiary and the title to the corpus would revest in the grantor upon the exercise of such power" (R. 7).

In that letter he also advised the Respondent that he might "file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency" (R. 5). The Respondent then appealed to the Board, contending that the trust was not revocable as alleged by the Commissioner in his deficiency letter (R. 3-4). In answer thereto the Commissioner denied this contention, but did not by an affirmative defense plead or otherwise assert the applicability of Section 22(a). The parties proceeded to frame a stipulation (R. 8-10) with regard to the only issue raised[1]—that the income was taxable under Section 166. In the preparation of the evidence and in his brief before the Board, Respondent directed himself solely to the proposition that his reversionary interest under the trust instrument

[1] There was one other issue which was disposed of by Paragraph X of the Stipulation (R. 10) and which is of no importance here.

did not give him "a power to revest . . . title to any part of the corpus of the trust" within the meaning of Section 166, and that if Section 166 of the Revenue Act of 1934 was so construed, it was invalid (Appendix, p. 30). The Commissioner's nineteen page brief before the Board argued that the trust income was taxable to Respondent under Section 166. The Commissioner there stated the "Question Presented", as follows:

> "Is the income realized by the trust created by the petitioner on December 29, 1930 taxable to the petitioner as grantor under the provisions of section 166 of the Revenue Act of 1934?" (Appendix, p. 31).

In a one page argument, the Commissioner also contended that Respondent was taxable under the provisions of Article 166-1, as amended, on the ground that the revesting provisions of the trust constituted a failure to part with the substantial incidents of ownership. (See Appendix A to Brief for Commissioner herein.) Obviously this point was advanced in support of tax liability under Section 166, for the Commissioner argued:

> "[Commissioner] contends that the regulations are reasonable and *fairly represent the intended application of the provisions of Section 166 of the Revenue Act of 1934* and that the application of the regulations to the facts of the instant case clearly requires that the Commissioner's determination of deficiency for the year 1934 should be sustained." (Appendix A to Commissioner's Brief.) (Italics supplied.)

The Commissioner's brief before the Board did not mention the now asserted applicability of Section

22(a); it concluded with the statement that "It follows that the determination of the Commissioner of Internal Revenue should be approved." This determination, as shown above, was that the income was taxable to the taxpayer under Section 166.

Clearly the Commissioner was relying at all times before the Board upon Section 166. Certainly the Respondent took that position in his reply brief before the Board. In that brief the Respondent concerned himself with distinguishing under Section 166 a revocable trust and one which revested[1], and, consequently, was only incidentally concerned with Article 166-1, as amended, contending that it was invalid to the extent that it went beyond the statutory provisions of Section 166. (See Appendix B to Brief for Commissioner herein, pp. 57, 58.) Certainly, too, the Board likewise understood that the sole issue raised was with regard to Section 166 of the Revenue Act of 1934. In its opinion the Board said:

> "The respondent, in adding the trust income to petitioner's income for 1934, has proceeded on the theory that section 166 of the Revenue Act of 1934 makes the trust income taxable to the grantor of the trust" (R. 17).

At another place the Board said:

> "The issue left for decision is whether the trust income is taxable to the petitioner under Section 166 of the Revenue Act of 1934" (R. 16).[2]

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[1] This distinction was pointed out by this Court in *Helvering* v. *Wood*, 309 U. S. 344, 347.

[2] See footnote p. 8.

From the foregoing it is obvious that the Commissioner, despite his present assertions, did not contend before the Board that the Respondent was taxable either under the authority of Section 22(a) of the Revenue Act of 1934 or under Article 166-1, as amended, in so far as that Article can be said to authorize taxation under Section 22(a), nor did he advance a similar argument.

Upon consideration of the only issue before it, the Board held that the trust income was not taxable to the Respondent for the year 1934 (R. 17). Thereupon the Commissioner filed a petition for review in the Circuit Court of Appeals in which he assigned as error the failure of the Board to hold that such income was taxable under Section 166 and Article 166-1 of Regulations 86, as amended. Section 22(a) was not mentioned; nor was Article 166-1, as amended, made the separate basis of an assignment of error; nor was error assigned for failure of the Board to hold that Respondent was in substance the owner (R. 20). That the Commissioner, after taking this appeal, still considered that the sole issue was based on Section 166, is manifested by his motion to withhold preparation of the record until this Court should decide the then pending case of *Helvering* v. *Wood*. In this motion, agreed to by the Respondent, he stated:

> "The issue involved in this case is similar to that presented in the case of *Commissioner* v. *Meredith Wood*, B. T. A. Docket No. 88426, (37 B. T. A. 1065)" (Appendix, p. 32).

It will be recalled that the *Wood* case had been litigated in the Board of Tax Appeals and in the Circuit Court of Appeals on the basis of Section 166 see *Helvering* v. *Wood*, 309 U. S. 344.

After the decisions by this Court in the *Wood* and *Clifford* cases, the Commissioner filed a so-called "Statement of Points to be Relied Upon" in the Circuit Court of Appeals (R. 22, 23). This was merely an afterthought. It was a mere attempt by a new procedural form that had just been adopted by the Circuit Court of Appeals to change the *Wood* case issue of Section 166 (upon which the appeal in the instant case was being stayed, as above pointed out) to a *Clifford* case issue of Section 22(a). This pleading was not a proper one either from the procedural standpoint or under the Rules of the Circuit Court of Appeals, and by it the Commissioner had no right to undertake to raise the new issue of Section 22(a). (See Objection (R. 25), and Motions (R. 26, 27).) In that Statement of Points not only will it be noted that the Commissioner sought to raise Section 22(a) for the first time, but it will also be noted that he did not rely upon Article 166-1 of Regulations 86, as amended, either as a basis for raising Section 22(a) or as a separate basis for asserting tax liability.

This same observation should also be made of the Commissioner's brief in the Circuit Court of Appeals. Therein, the Commissioner abandoned all reliance upon Section 166. In this connection he said at page 7 of his brief in the Circuit Court of Appeals:

> "In view of the decision in the *Wood* case, we are not here contending that Section 166 is applicable to the instant case. But we do believe and submit that Section 22 may properly be considered on this appeal and that under the *Clifford* case the Commissioner is entitled to a reversal here."

The Commissioner did not rely upon Article 166-1, as amended, in raising the issue of Section 22(a), nor

even urge its applicability. The Commissioner at page 7 of his brief said:

> "To be sure, Section 22 is not specifically mentioned in the assignments of error. We believe, however, that errors numbered 2, 4, 5 and 6 are clearly broad enough to cover the question."

Errors 2, 4, 5 and 6 were merely general in nature and made no reference to Article 166-1, as amended (R. 20), whereas that Article is specifically referred to, along with Section 166, in errors numbered 1 and 3 (R. 20). The Commissioner thus avoided urging errors numbered 1 and 3 "to cover the question" of the applicability of Section 22(a), although he is now relying upon those avoided errors for support of his argument before this Court. While the abandonment of reliance on Section 166 would seem of necessity to work an abandonment of Article 166-1, as amended, which depended for life upon Section 166,[1] it is apparent in any event that reliance upon Article 166-1, as amended, either alone or as a stepping stone to Section 22(a) was abandoned as fully as if the Commissioner had said so in so many words.

Furthermore, it is interesting to note in this connection that not only was Article 166-1 of Regulations 86, as amended, not even mentioned once in the body of his brief before the Circuit Court of Appeals, but also that in the Appendix thereto the Commissioner merely printed Article 166-1 of Regulations 86 as that Article existed before it was amended by Treasury Decision in 1936. How then can the Commissioner now be heard to urge legitimately that he has at all times

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[1] See pages 17-18 *infra* where the pertinent portions of Regulations 86 are quoted. They fully support this statement.

before the Board and also before the Circuit Court of Appeals, relied upon Article 166-1, as amended, as a basis for taxing the Respondent under Section 22(a)? It has been conclusively shown above that in the Circuit Court of Appeals the Commissioner did not rely upon Article 166-1 of Regulations 86, as amended, in any manner whatsoever. And in the Board, this Article was barely mentioned in the Commissioner's brief, and nowhere else, and then only in support of his argument based on Section 166.

As to the Commissioner's attempt to raise Section 22(a) for the first time in the Circuit Court of Appeals, the Respondent objected to the unwarranted use of a Statement of Points in an effort to raise the issue (R. 25). Respondent also objected by motion (R. 26, 27) and by brief to the Commissioner's raising of the Section 22(a) issue on the ground that it had not been tried before the Board and on the ground that such an issue had been in effect waived by prior proceedings. While these procedural arguments were before the Court, the Circuit Court of Appeals chose to rest its opinion upon established principles of jurisdiction governing appeals. Under those principles, often approved by this Court, the appellate court could not determine a new issue which had never been prepared for trial, and, accordingly, it could not consider the applicability of Section 22(a). Before the Circuit Court of Appeals the Commissioner did not attempt to show that the issue raised by the interjection of Section 22(a) was not a new issue. Rather, at page 8 of his brief, he admitted:

> "While it may be that the Board was not asked to pass upon the applicability of Section 22(a) in the instant case, and did not purport to do so, still it seems plain that the taxpayer may not avoid just

taxes because the Commissioner may have given an erroneous reason for the assessment."

Since the Circuit Court of Appeals had never been requested to find the Respondent taxable on the basis of Article 166-1, as amended, either alone or in conjunction with Section 22(a), it naturally could not consider that question, nor could it be held to have committed reversible error for failing to consider the question which was never put before it. In his petition to this Court for writ of certiorari, the Commissioner has for the first time advanced, by his so-called "sharpening" process, the applicability of Article 166-1, as amended, unsupported by Section 166, as being the stepping stone for assertion of tax liability under Section 22(a).

Certainly, in the light of the circumstances within and without the record, no one could say that the Respondent, at any time when this case was pending before the Board, was advised "with fair certainty" that there existed a claim of tax liability against him based upon an alleged applicability of Section 22(a). This Court has said explicitly in *General Utilities & Operating Co.* v. *Helvering*, 296 U. S. 200 at page 206:

> "Always a taxpayer is entitled to know with fair certainty the basis of the claim against him."

The only basis of "the claim against him" of which the Respondent was advised "with fair certainty", or which could even have been suggested, was an alleged taxability under Section 166. If he was successful in meeting that claim, that was all that could reasonably be expected of him. After all, it lay entirely within the Commissioner's discretion and power to fix any issue he might wish, and he specifically fixed as the issue

in this case taxability under Section 166. Certainly he could have asserted before the Board in the instant case in 1939 the same broad issue he had raised in the *Clifford* case, decided by the Board in his favor in 1938 (Memo. opinion, B. T. A. Docket No. 89054). The Commissioner has no just cause of complaint now in not being permitted to introduce on appeal this totally different and much broader issue. Viewed in the light most favorable to the Commissioner, what he now claims (which he did not claim in the court below) is that he argued in his brief before the Board a theory which could support a Section 22(a) issue, although he does not claim that Section 22(a) was directly put in issue before the Board. Can it be said that the taxpayer was advised "with fair certainty" that such issue was in the case when it was pending before the Board? If the answer should be in the affirmative, it will mean that hereafter no matter how specific an issue is fixed by the Commissioner, the taxpayer for his own protection will have to appeal to the Board and factually present evidence, not only on that issue but on every other issue that later could conceivably be raised under any of the provisions of the entire Revenue Code. No end of disorder would result from such a situation.

POINT II.

Article 166-1 as Amended in 1936 Could Not be the Basis for Assertion of Tax Liability in This Case Under Section 22(a).

While in the preceding Point I we have shown that the Article 166-1, as amended, was never used or even sought to be used by the Commissioner as the basis for asserting tax liability against the Respondent either by itself, or in conjunction with Section 22(a), until this case reached this Court, such Article from the legal

standpoint alone could not be made the basis for establishing the tax liability in this case. Taxability is established by statute not by regulations. See Brown, *Regulations, Reenactment and the Revenue Acts,* 54 Harv. L. Rev. 377, 397, for need of a pronouncement by this Court.

To begin with, a taxpayer must be able to place reliance upon what is said in the regulations promulgated by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury. According to what a taxpayer is told in the pertinent Regulations 86 (and similarly in other regulations over a period of years) he has the right to rely, on the fact that each article or series of articles interprets only that section of statute it follows. That each article of the regulations stems from, and is intended to interpret, a particular section of the Revenue Act appears from Article I of Treasury Regulations 86, interpreting sections of the Revenue Act of 1934. This Article states:

> "Scope of regulations.—These regulations deal with the tax upon net income imposed by Title I of the Revenue Act of 1934 . . ."
>
> "The articles bearing a given key number are the regulations promulgated with respect to the corresponding section, subsection, or paragraph of the Act; and the section, subsection, or paragraph of the Act shall be considered as a part of the respective articles to which it corresponds."

On page III of the Introductory Statement to these Regulations, it is stated:

> "The plan has been adopted by using the numbers of the Act as key numbers, followed by a dash (—), with the number of the article placed after the dash. By this means anyone who desires to learn how a given section or subsection of the Act

has been interpreted by the Bureau can readily and quickly find that interpretation by using the key number. Thus, if one desires to learn what interpretation has been placed on section 26 of the Act, he should turn to article 26-1 of the regulations."

Article 166-1 was not promulgated under Section 22(a); it was promulgated under Section 166, and, as appears from the foregoing quotation from the regulations themselves, it was applicable only to Section 166. That, too, was the Commissioner's view when the case was before the Board, for he asserted in the ninety day letter, by brief and in his assignments of error that the Respondent was taxable under Section 166. It should be noted that nowhere in Article 166-1, as amended, is there any cross reference to Section 22(a) or the regulations thereunder although there are cross references to other sections of the Revenue Act. Similarly, the regulations under Section 22(a) make no cross references to Section 166 or Article 166-1. Yet throughout the regulations there are innumerable cross references, which indicates clearly that there never was intended to be any connection between Section 22(a) and Article 166-1, as amended, and that the present claim to that effect is merely an afterthought.

Furthermore, Article 166-1, as amended in 1936 could not be the basis for asserting tax liability for the year 1934. *Helvering* v. *Wood,* 309 U. S. 344; *Helvering* v. *Clifford,* 309 U. S 331. Thus this Court in these recent cases has twice indicated on the merits that Article 166-1, as amended, can not be a stepping stone to taxation of 1934 income under Section 22(a). The *Wood* case is similar to the instant case in all important respects. In both cases the issue tried in the Board of Tax Appeals was on the basis of Section 166; while on appeal the Commissioner asserted taxability on the

basis of Section 22(a). It appears from the opinion in the *Wood* case that the Commissioner also advanced in this Court, as in the instant case, Article 166-1, as amended, as a ground for his shifting to the new issue. This Court merely noted that Article 166-1, as amended, could not have been relied upon to tax 1934 income under Section 22(a). A similar notation appears in the opinion of this Court in the *Clifford* case. In the latter case Section 22(a) was found to be applicable to the issues raised in the Board, but it was noted that Article 166-1, as amended, could not be considered an appropriate regulation on which to assert taxability for the year 1934 under Section 22(a). It is clear that while Treasury Decision 4629 necessarily amended the regulations then in effect, the amendment is only given effect in Regulations 94 which deal with taxes imposed by the Revenue Act of 1936. For reasons against the retroactive application of amended regulations, see Griswold, *A Summary of the Regulations Problem,* 54 Harv. L. Rev. 398. In the *Clifford* and *Wood* cases, the Court was merely following the precedent laid down by it in *Helvering* v. *Reynolds Tobacco Co.,* 306 U. S. 110, where a change in regulations was involved, and the Court said, at page 116:

> "We hold that the respondent's tax liability for the year 1929 is to be determined in conformity to the regulation then in force."

In that case also an amended regulation was advanced in an effort to include within the scope of Section 22(a) income which was not previously taxable. The Court's opinion did not find it necessary to distinguish its earlier decision in *Morrissey* v. *Commissioner,* 296 U. S. 344, in which this Court merely applied an amended regulation, which followed a previous decision of the

Court, redefining the category into which the taxpayer fell.

If Article 166-1, as amended, is to be given the broad interpretation sought by the Commissioner, it is plainly invalid as exceeding the scope of Secton 166 which it was promulgated to interpret. His brief indicates that irrespective of the scope of Section 166, Article 166-1, as amended, should be treated as a license to him to subject all short term trusts to the general provisions of Section 22(a), even though Congress has never seen fit to do so itself. *Helvering* v. *Wood,* 309 U. S. 344, 348.

POINT III.

The Action of the Circuit Court of Appeals in Refusing to Consider the Applicability of Section 22(a) was Proper and in Keeping With the General Law on the Subject.

The disposition of this case by the Circuit Court of Appeals was in accordance with the only position it could have taken consistent with the principles of appellate procedure approved in many rulings by this Court. The Commissioner had asked the Court to determine an issue which as shown above was a completely new one and one on which the Respondent might or might not have been found taxable before the Board if he had tried the case on that basis. The Circuit Court of Appeals held that it could not consider this new issue. In so doing, that court followed the principle laid down by this Court in many cases.

A case similar to the instant case in its proceedings below is *Burnet* v. *Commonwealth Improvement Co.,* 287 U. S. 415. In that case the taxpayer had raised two points before this Court, although the Board had expressed no opinion on one point which had not been raised. The Circuit Court of Appeals had likewise not

considered it. This Court ruled only on the litigated point, saying (287 U. S. 418):

> "We do not undertake to determine what was not considered below."

Respondent believes that ruling should be applied to the instant case for the same reasons that the Court applied it in the case of *Helvering* v. *Wood,* 309 U. S. 344. Since Section 22(a) was not considered below in either case, although raised for the first time in the instant case in the Circuit Court of Appeals, it would seem to make little difference whether that issue had been expressly waived as in the *Wood* case in the Circuit Court of Appeals or implicitly waived as in the instant case in the Board and also to begin with in the Circuit Court of Appeals (*supra,* p. 11). In both cases the taxpayer had every reason to think there was no such issue at all in the earlier stages of litigation.

This principle, which this Court has applied to its own considerations, it has also applied to those of the Circuit Courts of Appeals. Thus, in *General Utilities & Operating Co.* v. *Helvering,* 296 U. S. 200, this Court reversed a Circuit Court of Appeals where that court had held in favor of the Commissioner upon a ground not raised before the Board of Tax Appeals. At page 206 this Court stated:

> "The second ground of objection, although sustained by the court, was not presented to or ruled upon by the Board. The petition for review relied wholly upon the first point; and, in the circumstances, we think the court should have considered no other."

In the instant case there was no issue left for consideration since the Commissioner expressly abandoned the one issue upon which he had wholly relied in his pe-

tition for review. Therefore, the Circuit Court of Appeals could only rely upon the above ruling and affirm the Board's decision.

Moreover, this Court rebuked the Circuit Court of Appeals in *Helvering* v. *Salvage,* 297 U. S. 106, where that Court had considered a claim of estoppel which had neither been presented to the Board of Tax Appeals nor considered by it. In that case it was stated, at page 109:

> "The defense of estoppel was not before the Board. Under what we regard as the correct practice, *General Utilities & Operating Co.* v. *Helvering,* 296 U. S. 200 * * *, the court should have passed the point."

On the other hand, in *Helvering* v. *Pfeiffer,* 302 U. S. 247, this Court approved the action of the Circuit Court of Appeals, which had said: "The contention that we have authority to sustain the deficiency *pro tanto* even though the issue was not raised before the Board nor decided by it nor assigned as error in the petition to this Court for a review of the Board's decision is untenable." (88 F. (2d) 3, 5.) This Court said (302 U. S. at 250):

> "We are not at liberty to entertain that contention."

It will be noted that in all of the cases heretofore cited, this Court did not remand the case to the Board of Tax Appeals for trial of the new issue. It would be manifestly unfair to a taxpayer to require him, after he had defended his position before the Board and before two courts of review, to begin all over and to defend himself again by all necessary processes through trial and review against further charges made by the Commissioner for the first time on appeal.

The principle of appellate procedure which this Court has laid down to govern appeals before it and before the Circuit Court of Appeals is particularly applicable to tax cases. In *Blair* v. *Oesterlein Mach. Co.*, 275 U. S. 220, 225, this Court pointed out:

> "We think the question suggested is not properly before us. It was not specifically raised on the record before the Board or either court below and, so far as appears, was not considered by any of them. We were asked to grant certiorari only to pass upon the question whether the Commissioner's determinations under §§ 327 and 328 may be appealed to the Board of Tax Appeals. This Court sits as a court of review. It is only in exceptional cases, and then only in cases from the federal courts, that questions not pressed or passed upon below are considered here. *Duignan* v. *United States*, 274 U. S. 195. There are specially cogent reasons why this rule should be adhered to when the question involves a practice of one of the great departments of the government."

In a later case this Court noted some of the reasons why this principle should prevail in tax cases. In *Helvering* v. *Tex-Penn Oil Co.*, 300 U. S. 481, it is said at page 498:

> "The taxpayers were entitled to know the basis of law and fact on which the Commissioner sought to sustain the deficiencies. His failure earlier to present the question leaves this court without the assistance of decision below."

One of the reasons advanced there, the lack of assistance by an opinion of the lower court, was also pointed out in *Helvering* v. *Wood*, 309 U. S. 344, 349. Another compelling reason why this principle should prevail has been succinctly stated by the court below in re-

fusing to consider the new issue in the instant case (R. 29):

> "Obviously many facts which would be totally irrelevant to the issue which was presented to the Board might be pertinent and even determinative of the issue now sought to be raised for the first time in this court. The possibility of prejudice to the taxpayer appears to us to be self evident."

Had the Respondent been advised with fair certainty before the Board of the basis of the claim now asserted against him, he could have adduced additional, relevant evidence and otherwise have prepared the case for trial, so that the Commissioner's present position would not operate to his prejudice. Respondent believes that the principle of appellate procedure, the reasons for the principle, and the reasons for its application to the instant case are too clear to admit of argument. As applied where a new issue is urged for reversal, this Court said in the *Wood* case, after refusing its consideration (309 U. S. at 349):

> "It is not apparent why a less strict rule is necessary in order adequately to protect the revenue."

As to the introduction of the new issue of Section 22(a), the instant case, when it was before the Circuit Court of Appeals, was generally in the same relative position as the *Wood* case when it came before this Court. In each instance, for the first time, the applicability of Section 22(a) was urged. In the *Wood* case, this Court refused to pass upon the new issue raised before it for the first time. Nor did it remand that case. The Circuit Court of Appeals in the instant case did likewise, although it should be noted that Section 22(a) was not originally urged in the assignments

of error before the Circuit Court of Appeals, whereas Section 22(a) was urged in the petition for writ of certiorari in the *Wood* case. The Commissioner in his brief emphasizes the fact that this Court in the *Wood* case specifically referred to the waiver of the issue of Section 22(a) before the lower court. However, in the light of what has been said by this Court in the past, we do not assume that in the *Wood* case the main harm was done by waiver before the lower court. The harm was done initially when the initial tribunal, which is the trier of the facts and of the law as they are presented to it, had not had the opportunity to pass upon the subsequently raised issue. That same disadvantageous situation obtains whether the issue is raised for the first time in the Circuit Court of Appeals or for the first time in this Court. The Circuit Court of Appeals has no greater means of trying the facts upon the new issue than does this Court.

Obviously there are exceptions to the principle or rule referred to above which may be allowed when they do not operate to the prejudice of the parties or the appellate court. Thus, a court may consider a new argument or reason, advanced usually by the appellee, *to support* the determination reached by a lower court or board. Cf. *Helvering* v. *Gowran,* 302 U. S. 238; *Helvering* v. *Rankin,* 295 U. S. 123. That practice has been indulged by this Court to support the trial tribunal for a reason which had not been advanced in the appellate court below. Cf. *Helvering* v. *Leonard,* 310 U. S. 80, where taxability was asserted before the Board and the appellate court under the rule of *Douglas* v. *Willcuts,* 296 U. S. 1, and this Court found the taxpayer liable under that rule, reinstating the decision of the Board, for a reason not advanced in the Circuit Court of Appeals. But even in that case, the

Court had all pertinent facts before it; the respondent was not prejudiced and did not object to the raising of the new reason. That could not be the situation where, as here, a whole new issue involving much broader questions of law and fact was sought to be raised for the first time in the appellate court for the purpose of reversing the trial tribunal.

We think it unnecessary to comment at length on the many cases cited by the Commissioner in his brief as having to do with the question of raising new issues on appeal. Beside the point are those cases which hold that to support a decision of the initial tribunal the appellee may raise questions not raised below[1]. That is not the case here. Also beside the point are those exceptional cases in which to prevent injustice, courts have permitted the appellant to raise some new point of law where all the salient facts are before the appellate court[2]. In such cases the new point involved purely a question of law. That is not the case here and there are here no exceptional circumstances, a fact which was recognized in the *Wood* case.

Another group of cases which are not pertinent to the instant situation are those in which the appellate court, upon review of the issue decided below, found the record incomplete and therefore remanded the case for further findings necessary to a final determination[3].

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[1] *Helvering* v. *Gowran*, 302 U. S. 238.
Helvering v. *Rankin*, 295 U. S. 123.
Langnes v. *Green*, 282 U. S. 531, 539.

[2] *Legg's Estate* v. *Commissioner*, 114 F. (2d) 760 (C. C. A. 4th).
United States v. *Spalding*, 115 F. (2d) 54 (C. C. A. 5th).
Seufert Bros. v. *Lucas*, 44 F. (2d) 5-8 (C. C. A. 9th).

[3] *Edwards* v. *Holland Banking Co.*, 75 F. (2d) 713 (C. C. A. 8th).
Hamilton Gas Co. v. *Watters*, 75 F. (2d) 170 (C. C. A. 4th).
Eau Claire Book & Stationery Co. v. *Commissioners*, 65 F. (2d) 185 (C. C. A. 7th).
Underwood v. *Commissioner*, 56 F. (2d) 67 (C. C. A. 4th).

Likewise beside the point are those cases in which the issue was raised and passed on by the trial tribunal and then decided in the appellate court on a correct application of the law[1]. Into this category fall also sundry other cases where the law applicable to the issue was changed between trial and appeal. Such cases have no bearing here where the issue itself was not raised until after appeal had been taken.

We fail to see how under any circumstances the Circuit Court of Appeals can consider the new issue of the applicability of Section 22(a), involving as it does new and different questions. In the words of this Court, the issue under Section 22(a) "is whether the grantor after the trust has been established may still be treated, under this statutory scheme, as the owner of the corpus." *Helvering* v. *Clifford*, 309 U. S. 331, 334. The Court then said, at page 335:

> "The answer to that question must depend on an analysis of the terms of the trust and all the circumstances attendant on its creation and operation."

At page 338, this Court found that to determine such an issue it was necessary:

> "to leave to the triers of fact, the initial determination of whether or not, on the facts of each case, the grantor remains the owner for purposes of § 22(a)."

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[1] *Helvering* v. *Clifford*, 309 U. S. 331.
Sibbach v. *Wilson Co.* (U. S., December 13, 1940).
Commissioner v. *Berolzheimer*, (C. C. A. 2nd, December 23, 1940) (unofficially reported C. C. H. par. 9156), see 40 B. T. A. 645, 646, 648.
White v. *Higgins*, (C. C. A. 1, December 12, 1940) (unofficially reported C. C. H. par. 9136).

Contrary to Commissioner's present implication, there can be no presumption that Section 22(a) will make all trust income taxable, even if the trust be of short duration. Congress itself has not seen fit to do so. From what has been said above, it is obvious that a new and broader issue asserted by the Commissioner involves questions of fact as well as of law.

In the instant case, it is apparent that the facts which were stipulated were limited to those dealing with Section 166 and bearing on the question of revocability of the trust and not with regard to a far broader issue that would have been raised by Section 22(a). How, therefore, could the Circuit Court of Appeals then, or how can it now, with any propriety find Respondent taxable under Section 22(a)? As this Court said in *Helvering* v. *Wood*, 309 U. S. 344, 349:

> "The issues under § 166 and § 22(a) are not coterminous. Though both deal with concepts of ownership, the range of inquiry under the latter is broad, under the former confined."

Again, at page 347, it is said:

> "The problem of interpretation under § 166 is therefore quite different from that under § 22(a)."

In the light of what this Court has said, both with regard to the principle of appellate procedure and with regard to the factual requirements for determination of a broad issue based upon Section 22(a), this Court, we submit, should affirm the decision of the Circuit Court of Appeals, which was correct in its disposition of the case, for, under the limited question for review by this Court, that is, whether or not the Circuit Court of Appeals was correct in its action, there is nothing

which would enable the lower court to determine the new and broader issue based on Section 22(a).

CONCLUSION.

It is submitted that the decision of the court below should be affirmed.

Respectfully,

RICHARD H. WILMER,
DOUGLAS L. HATCH,
Attorneys for Respondent.

APPENDIX.

Excerpt from Table of Contents of Respondent's (Taxpayer's) Brief before the Board of Tax Appeals.

Argument

Preliminary Statement

Point I—A and B

No "Power to Revest in the" Petitioner "Title to any Part of the Corpus of the Trust" was Vested in the Grantor in Conjunction with a Person not Having a Substantial Adverse Interest in the Disposition of the Corpus or the Income Therefrom, for

A. The grantor's reversionary interest after the termination of the trust is not a "power to revest" within the meaning of Section 166 of the Revenue Act of 1934, or

B. The events of revesting of the corpus, namely, the death of the grantor or the death of the beneficiary, are not events of "power to revest" in the grantor.

Point I—C

No "Power to Revest in the" Petitioner "Title to any Part of the Corpus of the Trust" was Vested in the Grantor in Conjunction with a Person not Having a Substantial Adverse Interest in the Disposition of the Corpus or the Income Therefrom, for

C. The only "power to revest" in the grantor was with the consent of a person having a substantial adverse interest, namely, the beneficiary, and, therefore, expressly without the provisions of Section 166 of the Revenue Act of 1934.

Summary of Point I

Point II

The Attempt of the Respondent to Tax Petitioner on the Income Arising under the Trust is an Unconstitutional Exercise of the Taxing Power.

Point III

The Determination of the Commissioner should be set Aside.

Page 2 of Commissioner's Brief before the Board.

Question Presented.

Is the income realized by the trust created by the petitioner on December 29, 1930 taxable to the petitioner as grantor under the provisions of section 166 of the Revenue Act of 1934?

Motion of Commissioner in Circuit Court of Appeals for extension of time to complete and transmit the certified transcript of record on review.

Motion.

NOW COMES the Commissioner of Internal Revenue, petitioner on review in the above-entitled cause, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and

MOVES that the time within which to complete and transmit the certified transcript of record on review in the above-entitled cause to the United States Circuit Court of Appeals for the Third Circuit be extended from December 12, 1939 to and including May 1, 1940, and in support of this motion respectfully shows that:

1. On October 13, 1939 the Commissioner filed with the Board a petition seeking review of the Board's

decision in this cause by the United States Circuit Court of Appeals for the Third Circuit.

2. The issue involved in this case is similar to that presented in the case of *Commissioner* v. *Meredith Wood,* B. T. A. Docket No. 88426 (37 B. T. A. 1065), affirmed *per curiam* by the United States Circuit Court of Appeals for the Second Circuit May 29, 1939.

3. Petition for writ of certiorari in the case of *Meredith Wood, supra,* was filed on September 13, 1939 and granted by the Supreme Court November 6, 1939.

4. It is to the advantage of both parties to withhold the preparation, transmission, and delivery of the printed record *sur* petition for review in this case until the decision of the Supreme Court becomes final in the *Wood* case, which is not expected before May 1, 1940.

(signed) J. P. WENCHEL,
RLW
J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

JOHN W. SMITH,
Special Attorney,
Bureau of Internal Revenue.

No Objection:

(signed) DOUGLAS L. HATCH,
Attorney for Respondent on Review.

JWS:cm 11-25-39

SUPREME COURT OF THE UNITED STATES.

No. 516.—October Term, 1940.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, *vs.* O. G. Richter. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[March 17, 1941.]

Mr. Justice Black delivered the opinion of the Court.

Because the decision below, 114 F. (2d) 452, was in conflict with that of the Circuit Court of Appeals for the Eighth Circuit in *Helvering* v. *Hormel,* 111 F. (2d) 1, affirmed this day, we granted certiorari "limited to the first question presented by the petition for the writ." 311 U. S. —. The petition stated that question as follows:

"The taxpayer transferred securities to a third party in trust to pay the income to his wife. At the end of five years, or earlier if the beneficiary consented, the securities were to be transferred back to the taxpayer. The Board of Tax Appeals held that the grantor was not taxable with respect to the income from the trust. Two questions are presented:

"1. Whether, by invoking the general gross income provisions of Section 22, the Commissioner had so changed the theory of the Government's case on appeal as to preclude the Circuit Court of Appeals from considering the issue.

"2. Whether, on the merits, the trust income was taxable as income of the grantor under Section 22."

In view of the limited grant of certiorari, the second question is not before us. On the first question, the Circuit Court of Appeals held that it could not consider the applicability of section 22(a), that being an "issue now for the first time presented by the Commissioner." The decision of the Board of Tax Appeals, which the Circuit Court of Appeals affirmed, was handed down prior to our decision in *Helvering* v. *Clifford,* 309 U. S. 331. Respondent urges that had he been advised with fair certainty that the government relied upon section 22(a), he could have introduced additional evidence directed to that issue. For reasons set out in our decision

in *Hormel* v. *Helvering*, we are of opinion that the Circuit Court of Appeals was in error in its conclusion, but we are also of opinion that respondent is entitled to introduce additional evidence if he so desires. The judgment is accordingly reversed, with directions to the court below to remand to the Board of Tax Appeals for rehearing in the light of the *Clifford* case.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.